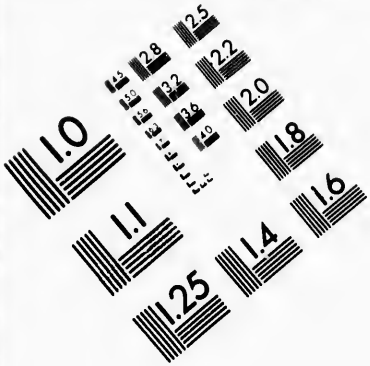

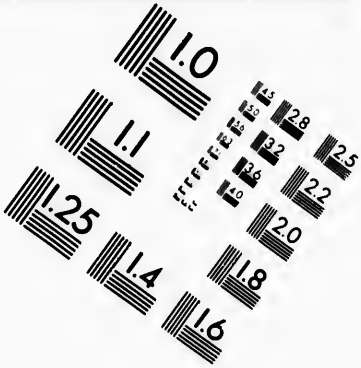

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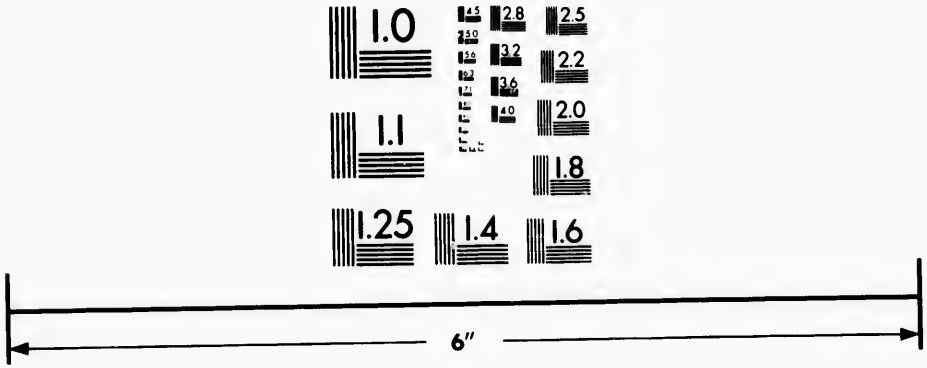

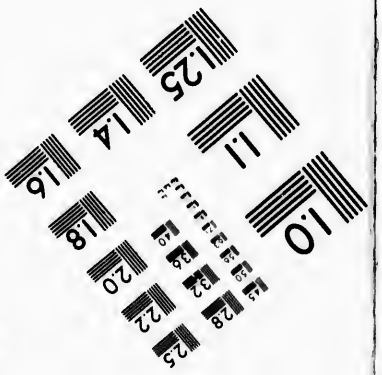

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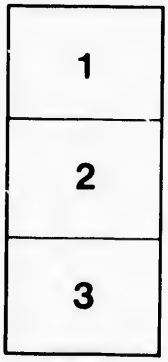

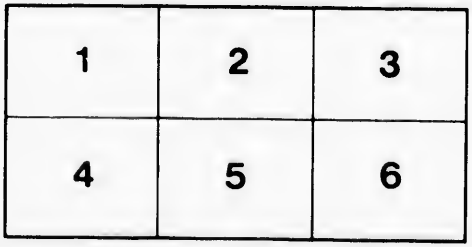

ON APPEAL TO THE FULL COURT.

BETWEEN JAMES McNAMARA, (PLAINTIFF) RESPONDENT,

AND

THE CORPORATION OF THE CITY OF NEW WESTMINSTER, (DEFENDANTS) APPELLANTS.

CASE ON APPEAL.

MESSRS. CORBOULD, McCOLL, WILSON & CAMPBELL,
Solicitors for Appellants.

E. A. JENNS,
Solicitor for Respondent.

NEW WESTMINSTER, B. C.
Printed by FRED. JACKSON, Royal City Printing Works.
1897.

In the Supreme Court of British Columbia.

IN THE FULL COURT.

BETWEEN

JAMES McNAMARA,

RESPONDENT.

AND

THE CORPORATION OF THE CITY OF NEW WESTMINSTER,

APPELLANTS.

Short Statement of Case.

This action is brought by Plaintiff for damages alleged to have been sustained by him in the depreciation of the values of certain city lots owned by him in consequence of the lowering of the levels of the streets upon which said lots are situate, by the cutting down of said streets by defendants in the course of certain improvements made by them on the streets. The action came on for trial before His Honor Judge Bole, Local Judge, on the 19th, 23rd and 24th days of January, A.D. 1893, who gave judgment in favor of the plaintiff.

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In the Supreme Court of British Columbia.

Writ issued the 28th day of May, 1892.

BETWEEN

JAMES McNAMARA,

PLAINTIFF,

AND

THE CORPORATION OF THE CITY OF NEW WESTMINSTER,

DEFENDANTS.

Endorsement on Writ.

The Plaintiff's claim is for compensation for damages done to his property, being Lots numbered seven and eight, in Block numbered seventeen, in the City of New Westminster, by the excavation or alteration of the line or level of Columbia Street in front thereof.

And also for compensation for damages done to his property, being Lot numbered nine in Block twenty-seven, in the said City of New Westminster, by the excavation or alteration of the line or level of Carnarvon Street in the front thereof.

And also for compensation for damages done to his property, being Lot numbered four, in Block numbered seventeen, in the said City of New Westminster, by the excavation or alteration of the line or level of Armstrong Street in the front thereof.

Statement of Claim.

1. At the times in the years 1889 and 1890 hereinafter mentioned, certain land, being Lots 7 and 8 in Block number seventeen, in the City of New Westminster, on the Northerly side of Columbia Street; and Lot number 9 in Block 27

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situated on the Northerly side of Carnarvon Street; and Lot number four in Block seventeen situated on the Northerly side of Armstrong Street, of and in the said City of New Westminster, were and are in the possession of the Plaintiff as owner thereof in fee simple.

2. Many years before the said times the surface of the said Columbia Street was nearly on a level with the said Lots 7 and 8 in Block 17, and by By-law or Resolution passed by the Defendant Corporation a grade was fixed and the level of the said street was excavated or lowered to the level of the said grade and the said street was thereafter until the said year 1890, as so graded, used by the Plaintiff the predecessors in title of the said Plaintiff their tenants and other persons travelling on the said street.

3. Before the said year 1890 the predecessors in title of the said Plaintiff had applied for and obtained from the Defendant Corporation the grade line of the said street and the street line of the said Lots seven and eight and thereupon had erected upon such grade and line a strong cribbing along the South boundary of the said Lots to prevent the soil of the said lots from caving or falling into the said street or otherwise. Thereafter the Plaintiff's predecessors in title erected two houses upon the said lands, and the Plaintiff and his tenants had easy access to the same from the said street so graded as aforesaid.

4. The Defendants in the year 1890 wrongfully ordered the Plaintiff to remove the said cribbing and fence further back, and wrongfully excavated and lowered the said street in front of the said Lot and cut in and trespassed upon the said Lot and withdrew support to which the Plaintiff as owner of the said Lot was entitled, whereby it became necessary for the Plaintiff at great expense to erect a new retaining wall to prevent the soil of the said Lots from caving or falling into the said street, and the said Lots by reason of such lowering of the grade of the said street are rendered much less valuable, and the right of ingress and egress to and from the said Lots over the said street is rendered permanently more difficult than it was before the said year 1890.

5. The Council of the City of New Westminster before the doing of the acts complained of had not passed any by-law as required by the Act incorporating the said City, authorising the doing of the Acts complained of, and the Defendants have lowered the said street and done the said acts as alleged without any legal authority, and without in other ways observing the formalities required by the Act for altering or improving the streets of the said City.

6. The Plaintiff further says that before the said year 1890 the surface of the above-named Carnarvon Street was nearly on a level with the said Lot 9 in Block 27, and for many years a foot path had existed and been maintained on the Northerly side of the said street abutting upon the said Lot for the use of the Plaintiff, his tenants and his and their predecessors in title to reach the said land and other persons travelling on foot on the said street.

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7. For many years a house had been built upon the said land, and the Plaintiff, his tenants and his and their predecessors in title had access to the same from the said street, access to and from which house was easily effected over the said street.

8. The said land was of right supported by the land of the said street.

9. The Defendants in the year 1890 wrongfully excavated the said street in front of the said Lot, 10 feet or thereabouts, and thereby have withdrawn support to which the Plaintiff as owner of the said Lot is entitled.

10. The Plaintiff was also entitled to have for himself and his tenants the use of the said street in its natural state from and out of the said lot and back again, to go, pass and repass to and from the said street, and the Defendants in the said year 1890 wrongfully excavated and lowered the said street to the depth of 10 feet or thereabouts, below the said lot, and thereby rendered the approach to and from the said Lot over the said street very difficult and almost impossible.

11. The Defendants excavated and lowered the said street as alleged negligently, carelessly and unskilfully in not leaving a sufficient support to the said Lot from the soil of the said street, and in not erecting a retaining wall or other fixture to prevent the soil of the said Lot from caving or falling into the said street and otherwise.

12. By reason of the said several and respective grievances the Plaintiff's interest in the said Lot was greatly injured, and the said Lot is much less valuable, and the Plaintiff was forced at great expense to erect a stone retaining wall to prevent the soil of the said Lot from caving or falling into the said street, and the right of ingress and egress to and from the said Lot over the said street was rendered permanently more difficult than it had hitherto been.

13. The Council of the City of New Westminster before doing the acts complained of had not passed any by-law as required by the Act incorporating the said City, authorising the doing of the acts complained of, and the Defendants have lowered the said street and done the said acts as alleged without legal authority and without in other ways observing the formalities required by the Act for altering or improving the streets of the said City.

14. And the Plaintiff further says that the surface opposite the above named Armstrong Street, was previous to the said years 1889 and 1890, nearly on a level with the above named Lot 4 in Block 27, which said street had for many years been constructed and maintained for the use of the Plaintiff, his predecessors in title and other persons travelling on the said street.

15. The land of the said Lot 4 was of right supported by the land of the said street.

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16. The Defendants in the year 1889 wrongfully excavated and lowered the said street in front of the said Lot, 8 feet, or thereabouts, and thereby have withdrawn support to which the Plaintiff as owner of the said Lot is entitled.

17 The Plaintiff was also entitled to have the use of the said street in its aforesaid state from and out of the said Lot and back again to go, pass and repass, to and from the said street, and the Defendants in the years 1889 and 1890 wrongfully excavated and lowered the said street to the depth of 8 feet or thereabouts below the said Lot, and thereby rendered the approach to and from the said Lot very difficult and almost impossible.

18. The Defendants excavated and lowered the said street as alleged negligently, carelessly and unskilfully in not leaving a sufficient support to the said Lot from the soil of the said street, and in not erecting a retaining wall or other fixture to prevent the soil of the said Lot from falling or caving into the said street or otherwise.

19. By reason of the said several and respective grievances the said Plaintiff's interest in the said Lot was very greatly injured, and the soil of the said Lot sank, gave way and caved into the said street, and the said Lot is much less valuable,and the right of ingress and egress to and from the said Lot over the said street is rendered permanently very difficult and almost impossible without the expenditure of a large sum of money.

20. The Council of the said City of New Westminster have not passed any by-law as required by the Act incorporating the said City, authorising the lowering of the said street, and the Defendants have lowered the same as alleged without any legal authority, and without in other ways observing the formalties required by the Act for altering or improving the streets of the said City.

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The Plaintiff claims

1.—The cost of removing the stone retaining wall opposite Lots 7 and 8.....	$ 500 00
2. Depreciation in value of the said lots.....	2000 00
3. Damages for trespass upon the said Lots	1000 00
4. The cost of building retaining wall and steps into the said Lot 9 in Block 27	400 00
5. Depreciation in value of the said Lot	500 00
6. The cost of building retaining wall and steps into the said Lot 4 in Block 27	400 00
7. Depreciation in value of the said Lot	500 00
	$5300 00

Such further or other relief as the nature of the case may require.

The Plaintiff proposes that this action shall be tried at New Westminster.

DELIVERED this 8th day of July, A.D. 1892, by E. A. Jenns, of 40 Lorne Street, New Westminster, B. C., Solicitor for the Plaintiff.

To James W. McColl, Esq., Solicitor for the Defendants.

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Statement of Defence.

1. The Defendants deny that the Plaintiff at the times when the acts complained of in this Statement of Claim were alleged to have been committed was in possession of the hereditaments therein as owner thereof in fee simple.

2. The Defendants deny that at any time the predecessors in title of the Plaintiff of Lots 7 and 8 Block 17 being part of the hereditaments mentioned in the Statement of Claim, obtained from the Defendants the grade line of the street and the street line of the Lots, and deny the alleged erection of strong cribbing, and the Defendants do not admit any of the allegations contained in paragraph 3 of the Statement of Claim.

3. The Defendants deny that they, in the year 1890 wrongfully ordered the Plaintiff to remove the cribbing and fence said to have been erected on the said Lots further back, and further deny the other allegations contained in paragraph 4 of the Statement of Claim and each and every of them.

4. The Defendants deny that the said works were executed without the passing of a by-law or without legal authority, and deny that the formalities required by the said Act were not complied with or that compliance with the said formalities or any of them were conditions precedent to the exercise of their authority to do the acts complained of.

5. And with respect to Lot 9, Block 27, the Defendants deny that any footpath had existed and was maintained on the Northerly side of Carnarvon Street abutting on said Lot, for the use of the plaintiff, his alleged predecessors in title and his other tenants to reach the said hereditaments or for the use of other persons.

6. The Defendants do not admit that the Plaintiff, his tenants and their predecessors in title had access to the said hereditaments from the said street, and deny that access to and from the said house to have been erected on the said hereditaments was easily effected over the said street.

7. The Defendants deny the statements contained in the Statement of Claim and each and every of them, and with respect thereto say :—

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8. That if it shall be proved that the Plaintiff is so possessed of the said hereditaments so as to be entitled to maintain this action, then the Defendants say that they are a municipal corporation incorporated by and subject to the provisions of an Act of the Legislative Assembly of the Province of British Columbia, passed on the fifty-first year of Her Majesty's reign and known as the "New Westminster Act, 1888," and of the Acts Amending the said Act.

9. The Defendants acting in pursuance of the powers and in performance of the duties conferred and cast upon them by the said Acts, for the purpose of repairing, levelling and grading the Carnarvon, Columbia and Armstrong Streets, cut down the same in some places and raised the same in other places, one of the places where the same was so cut down being opposite to the hereditaments mentioned in the Statement of Claim, but without trespassing upon the Plaintiff's alleged lands or prejudicing the same, which are the alleged wrongful acts of the Defendants in the Plaintiff's Statement of Claim mentioned.

10. Before the execution of the said works by the Defendants the said street had no established grade or level, and was not in a fit or proper state for use as a public street, wherefore the Defendants caused the same to be put in a fit and proper state for use as a public street, making only such changes in the said street as were necessary owing to the uneven nature of the surface of the ground, and exercising proper care and skill in so doing, and thereby benefitting instead of injuriously affecting the Plaintiff's said property, which are the alleged wrongful acts of the Defendants

11. The Defendants deny that before the execution of the said works the surface of the said streets was nearly level with the said lands.

13. The Defendants deny that the said lands or any part thereof was of right supported by the land of the said streets, and deny that the execution of the said works has deprived the Plaintiff of any support to which the owner of the said lands would be entitled.

13. The Defendants deny that the Plaintiff's said house was entitled to the support of the land of the said streets, and deny that the execution of the said work has deprived the plaintiff of any support to which he was entitled as owner of the said lands.

14. The Defendants deny that the Plaintiff was entitled to have for his tenants the use of the said streets in their natural state, and deny that the execution of the said works has had the effect alleged in the Statement of Claim.

15. The Defendants deny that the works done by them in the said streets were

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executed in a negligent, careless and unskilful manner, either by not leaving sufficient support to the said Lots for the soil of the said respective streets or by not erecting a retaining wall, and deny that the works done by them in the said streets was in any way done carelessly, negligently or unskilfully.

16. The Defendants do not admit that the Plaintiff has suffered any such injury as is alleged in the Statement of Claim.

17. The Defendants deny that the said works were executed without the passing of a bylaw or without legal authority.

18. If the execution of the said works constitute an alteration of the said street such alteration was duly made as authorized by the said act.

19. The Plaintiffs did not before erecting the said houses or either of them, obtain from the City Engineer or Surveyor the level or line of the said street.

20. The Defendants did what is complained of by the Plaintiff's leave.

DELIVERED this 1st day of November, A. D. 1892, by James W. McColl, of the firm of Corbould, McColl, Wilson and Campbell, Lorne Street, New Westminster, B. C.

Solicitor for the Defendants.

To E. A. Jenns, Esq.,

Solicitor for the Plaintiff.

Reply.

1. The Plaintiff joins issue with the Defendants upon their Statement of Defence.

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2. The Plaintiff denies that any such leave was given as alleged in paragraph 20 of the Statement of Defence, but if so it was not in writing and the Statute of Frauds has not been complied with.

DELIVERED this 24th day of November, A. D. 1892, by Eustace Alvanley Jenns of Lorne Street in the City of New Westminster, B. C.,

Solicitor for the Plaintiff.

To J. W. McColl, Esq.,

Solicitor for the Defendants.

Notice of Trial.

TAKE NOTICE of the trial of this action before a Judge at the Court House, New Westminster, for the 19th day of January, A. D. 1893.

Dated this 16th day of December, A. D., 1892.

E. A. Jenns,

Solicitor for the Plaintiff.

To James W. McColl, Esq.,

Solicitor for the Defendants.

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In the Supreme Court of British Columbia.

(Before Mr. Justice Bole).

New Westminster,

January 19th, 1893.

McNAMARA

vs.

THE CORPORATION OF THE CITY OF NEW WESTMINSTER.

Mr. Jenns and Mr. Eckstein for the Plaintiff; Mr. Charles Wilson for the Defendant Corporation.

[Agreed by Counsel upon both sides, upon intimation to them by the Judge, in case Counsel wishes to take any objection, that he (the Judge) is a ratepayer of the City of New Westminster, that even if such fact operates as a disqualification objection to same is waived.]

James McNamara. Called and sworn. Examined by Mr. Jenns.

Q. Your name is James McNamara? A. Yes.

Q. Did you bring those deeds with you? A. No, sir.

(Leave given by Court to put in deeds later on.)

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Q. Court (to witness): You have the deeds at home? A. Yes, sir; here at the land office, in the safe; Mr. Warwick's office.

Q. Mr. Jenns: You are the plaintiff in this action, are you? A. Yes, sir.

Q. Do you know lots 7 and 8, block 17. A. Block 17.

Q. And lot 4? A. Lot 4.

Q. In the same block? A. Yes, sir.

Q. Who is the owner of them? A. I am, sir.

Q. And you were the owner, Mr. McNamara, at the time this action was brought? A. Yes, sir.

Q. And before. Are they built on? A. Two of them.

Q. Which two are built on? A. Lots 7 and 8, sir.

Q. How many houses are there on them? A. Well, there is a house on each.

Court: But not on lot 4? A. No, sir.

Q. When you bought lots 7 and 8, what sort of fences were there? A. Pretty good fences.

Q. How were they built? A. They were built with cribbing and board, and painted outside.

Q. Are those fences there now? A. No, sir.

Q. How did they come to be taken away. A. Well, as Hoy was passing there one morning, I was standing outside, and he told me that the Council was going to cut in a piece in there. I didn't seem to say anything and he went away down the street, and after a while I came down and I saw going in out of the sidewalk. There were some rose-bushes and flowers and things, and of course I wanted to save my flowers and rose-bushes and good clay that was there to shovel back; and I shovelled it back, and then the wife got after me—she could not get in or out.

Mr. Wilson: We don't want anything about that. A. Well this is the truth. And then I went to Mr Hoy, and asked him for the right to cross and get some stones over the other side, which he gave me. I told him nothing else would do there only a stone wall, and I gave the contract then for a man to build a stone wall, and had a ladder up there ever so long to climb up to the place.

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Q. What level was the street on, outside? A. Oh, the street? I had a good grade from the hall door down to the street at this time, and then when they cut off this two feet piece, I had to move the steps down in another direction altogether, so as to go up, and then walked along the portion of the steps that was there in the first place.

Q. The cutting down the street made you alter your steps? A. Oh, yes, sir; too steep to get up.

Q. What was the cost of putting that stone wall up? A. Well, that stone wall cost considerable.

Q. How much was that? A. All of $300.00, perhaps more, because I didn't understand it.

Q. What did it cost you to alter your steps? A. Well, the steps were altered when I moved down the other side; the steps were cut away.

Court: By reason of the change you had to alter your steps, what did it cost you? A. Well, cost considerable, for I had to build a stone wall on each side.

Q. About how much? A. Cost about $25.00, sir. I had to build up there a stone wall on each side of it.

Q. Is there any difference in value of those lots before and after taking away the old fence? A. I could not say sir.

Q. About Lot 4? A. Lot 4,—they cut it right down.

Q. Before we pass from Lot 8, block 17, you know the claim for depreciation of Lots 7 and 8, that is, a lessening in value. How much do you consider that lots 7 and 8 were reduced in value by reason of what you have described?—that is, the cutting down of the street and the taking away of a part of the soil? A. My lord, I could not say.

Mr. Jenns: I think I shall drop the claim for depreciation in that part. I will call other witnesses for depreciation in value of Lot 4. We have offered for the city to settle for the bare cost of the wall, so it is hardly worth while pressing the additional charge now.

Mr. Jenns *(to witness)*: Lot 4, Mr. McNamara, in what state was that? A. It is on Armstrong street and Carnarvon.

Q. Before '91 in what shape was Armstrong street? A. It was in a poor fix; not in very good condition. They cut it down; they commenced to cut my lot down 6 feet; 5 or 6 feet.

Q. That is, you mean, they cut the street down opposite the lot. A. Cut the street down, and several feet of my bank too. About 2 feet; they went inside.

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Q. Inside the street lines, and cut two feet of earth away? A. They built a sidewalk then; the clay was always dropping on it and I had to get a shovel to keep it clear, and these men from the Council running back and forwards in order to keep the sidewalk clear.

Court. I recollect quite well the cutting of Armstrong street. It is Carnarvon street that I have not looked at. It comes almost to the back of Lots 8 and 9? A. Yes, my lord. That clay was constantly coming down and there was a stonemason up at Mrs. Brighouse's and he come to me and told me he had a lot of stones up there, and I let him a contract to build it, and he built it for somewhere about $100; that is lot 4.

Mr. Jenns: Is lot 4 as valuable now since the street has been cut down as it was before? A. I should think it would, after I put my wall up.

Cross-examined by Mr. Wilson.

Q. Then I suppose my learned friend will strike the depreciation in value out in that lot? It will lighten the ship a little further. Mr. McNamara like a straightforward, honorable gentleman says it is probably just as good as it was before? A. Yes, at present, but not until I laid out $100 on it.

Mr. Jenns: That street was open for traffic before Armstrong street? A. Yes, no sidewalk or anything of that kind there at all; merely a piece, a part lower down, at the lower end of it. Mr. McColl built a small portion at the lower end of his own property; that is the only sidewalk—right through the mud.

Mr. Wilson: If we can get down to what is our actual record, it will save a good deal of time. Nos. 1 to 7, No 1, is that retained?

Court: They are going on with No. 1 as I understand it from my notes. The two thousand is abandoned; the trespass is abandoned. Building retaining wall on lot 4, block 17, that still stands. The five hundred is abandoned.

Mr. Jenns: No; I don't know that we abandon that, although Mr. McNamara says he does not think there has been any depreciation.

Mr. Wilson: Then 6 and 7.

Court: Are abandoned.

Mr. Jenns: No. 6 and 7 are retained.

Mr. Eckstein: No. 5 is abandoned.

Mr. Wilson: I was taking the recapitulation of them at the end.

Mr. Jenns: Six and seven are lot 4, block 17.

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Court: Yes; that is the very thing that I want to correct; that is lot 9, block 17. So the claim now before the Court is $1400.

Mr. Wilson (to witness) Mr. McNamara you told us that there was a fence up in front of the Columbia street property when you bought it. When was it that you bought it? A. I never boarded it, sir. It was boarded when I bought it.

Q. And when did you purchase the lots? A. Well, I couldn't say now. About 6 years ago, I think. Six or seven years ago, sir.

Q. It was a good fence when you got it 6 or 7 years ago? A. Yes; it was a good fence when I pulled it down.

Q. Why did you pull it down? A. I had orders to pull it down.

Q. Who told you? A. Mr. Hoy told me my place had got to be cut in 2 feet.

Q. If Mr. Hoy had told you to cut into it 10 feet would you have done it. A. No; it would have let my house down, and family.

Q. Why did he want you to do it? A. Because he was chairman of the Council.

Q. But you do not undertake to follow all Mr. Hoy's instructions with respect to the management of your property? A. Well, as far as anything of that kind goes, he is there to give instructions, or to do it. I don't know the law.

Q. And so you simply did it because Mr. Hoy asked you to do it? A. Yes; or the same thing; if he hadn't spoke to me about it, I would not have.

Q. Between ourselves, didn't you do it willingly. A. Willingly?

Q. Yes? A. What is the use of me kicking when the Council orders my bushes and fence and everything down? What is the use of my going against the Council?

Q. If you had come to the Judge you could have kicked effectually. He would have put you right? A. He would?

Q. Yes. A. He would have put his own piece right.

Q. You did not kick then because you thought it was of no use? Is that the reason? A. Kick?

Q. Yes. A. Yes; I didn't see no use in kicking.

Q. So, in consequence of what Mr. Hoy told you then, you took your fence down, and what did you do?—build the wall yourself? A. I just put back the

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rose bushes and things, and at the time of year that I would lose them; too.

Q. And you put up the wall yourself? A. Put up the wall, yes, and I paid for it.

Q. You paid somebody else to do it? A. Yes, sir.

Q. Who was it you paid to do that work new? A. Two or three different parties, sir.

Q. Who were they? Tell us. A. I don't know their names. Mr. Kelly paid them the money. I don't hardly know their names. There is one gentleman there (pointing) who did the work for some of them.

Court: The late Mr Kelly was your agent? A. Yes, sir.

Mr. Wilson: Mr. Kelly was your agent, and, acting for you, he paid them? A. By my orders.

Q. I understand it. Was it Mr. Kelly who engaged them, or was it yourself? A. I engaged them.

Q. And sent them to Mr. Kelly yourself? A. I gave them an order to Mr. Kelly about paying them.

Q. Don't you think that Columbia street is a great deal improved to what it was before this alteration was made in it? A. It might be, for all I know.

Q. Oh, come now, be fair about it. Don't you think it is greatly improved? A. It might be for some people; not for my part.

Q. But isn't it greatly improved in front of your property? A. Oh, well, that I had to pay for.

Q. But is not the street greatly improved? A. We seemed to get along with it before just as well as now.

Q. But you don't think Columbia street shows any improvement? You don't like to admit that? A. It might.

Court: It is not the improvement that he objects to, I think, but the fact that he should be asked to pay for the improvement. Witness: That is where the shoe pinches, my lord.

Mr. Wilson: So the fact is, it has improved, but you don't like to pay for it? A. No; I pay for everything that belongs to me honestly.

Q. But you don't want to pay any more? A. No; I don't want to pay any more. I have paid too much already.

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Q. You are satisfied with the improvements? A. Satisfied? I have got to be.

Q. Have you got to be, on the same principle as when you moved the wall back when Mr. Hoy told you? A. I have got more taxes to pay than I had before; no drop in the taxes at all that I see.

Q. Don't you remember telling Mr. Hoy that you were satisfied with the work? A. That I was satisfied?

Q Yes. A. I might, for all I know. I am satisfied now.

Mr. Jenns: I object that on the pleadings there is the defence raised that the work was done by consent of the plaintiff, and these questions are relative to that. The reply to that is that if there was any agreement to that, it would have to be in writing under the Statute of Frauds as to agreements concerning land.

Court: Let the question be taken subject to that objection.

Mr. Jenns. Certainly, your lordship. I have no objection to your lordship learning all about the facts of the case.

Mr. Wilson: An agreement concerning land is one thing, and agreement to waive damages for possible injury to land is another thing; but irrespective of that, I submit, my lord, that I have a perfect right to cross-examine?

Court: Certainly. I do not propose to stop you asking the question, but, on the other hand, it is only fair to Mr. Jenns that the objection should be noted.

Mr. Wilson (to witness): Do you remember telling Mr. Hoy that you were contented with the alterations that were being made? A. No: I don't remember telling him anything of the kind. I might have said it, for all I know. We said a good many things back and forwards. I don't remember anything of the kind—that I was satisfied. If I was satisfied, I would not be here to-day.

Q. Why did you wait so long before you brought this action? A. I didn't wait so long.

Q. Excuse me. The injury was done to you when? A. They were bluffing me; wanted me to arbitrate. I was waiting to see if they would do anything in the matter.

Q. When was the injury done to you?—in 1890? A. I guess the Council before last.

Q. Before 1890? A. 1890, sir? I don't know the year exactly. Mr. Collis (or Collins) was with me, and Mr. Keary of the Finance Committee.

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Q. Do you know the year? A I think '91, '92—I don't know.

Q. How many years back? A. Since they were talking to me?

Q. No; since the work was done? A. I believe 3 years this June coming, sir

Mr. Wilson: You waited from June, 1890, then, to May, 1892, before you brought this action—for two years? And yet you now tell us you would not have done this if you were satisfied.

Court; Why did you wait so long? A. I was waiting for them to be settled.

Q. Were they talking about settling? A. Mr. Keary was on the Finance Committee, and took me into the house, and I signed a document leaving it to arbitration, and then I was waiting and didn't hear anything from him afterward, and I went to my agent and told him I would like to hear from him. I wanted to hear something from him.

Mr. Wilson: Weren't you waiting the result of Mrs. Brigh use's case? A. Nothing of the kind. I never was in court before; never inside this place, on business.

Mr. Jeuns: The writs were all issued before the result was known.

Mr. Wilson: Do you remember telling Mr. Hoy that if all the people were like you there would be no kick about it, at all. A. I don't remember saying anything of the kind to Mr. Hoy.

Q. Is it possible you might have said it? A It is possible I might have said it. I talked a good deal to Mr. Hoy back and forward.

Q. Don't you remember asking them to dig the ground to put your wall in? That the workmen should be permitted to dig it away? A. What was the use of my digging a place for the wall, if I didn't know where the wall would be? Of course they had a surveyor to put the proper line.

Q. Kindly answer my question. Do you remember asking that the corporation servants dig away the ground to enable you to put up the wall? A. The corporation did nothing of the kind, sir. I dug the place myself.

Q. Did you yourself dig out the foundation for the wall on Armstrong street? A. No; but the men I employed did it.

Q. I don't want to trap you Mr. McNamara, but try to remember that thing a little better. Are you sure you did that? A. I am sure the man I gave the

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Q. But didn't you ask the corporation servants to dig it out? A. No, sir: I didn't. I never asked them for anything on that street at all.

Q. Didn't you repeatedly press that the improvements effected on Armstrong street be made? A. Certainly I wanted to see the street opened. How could I get out the back way? It is more important to me to get out the back way than it is in front. I wanted to get the sidewalk not built where it is now. I wanted it on my own side where the people go into the buildings. It is built where nobody is living.

Q. Didn't you ask for Armstrong street to be built up? A. I did not.

Q. Are you sure about that? A. I am sure I never did, to the best of my belief.

Q Are you sure you never on more than one occasion asked for Armstrong street to be built up? Don't misunderstand me. It is the street you are making a claim about at the end of the lot which touches on Armstrong street. Didn't you ask repeatedly that that street be opened up? A. What would be the use of my asking?

Q. Did you? A. I don't believe I did. To the best of my belief, I never said a word about it. What had I to do with the opening of their streets?

Q. Is it not a fact that before that Armstrong street was hardly passable?—before the improvements were effected? A. We got along all the time in it.

Q. Yes you can get along anywhere, and go through the mud in gum boots.

Court: Was it a good street? A. No, my lord. It was a bad street, a poor street, and it is nothing extra, yet, and it was put to accommodate His Worship the Mayor, there, from the upper end of it, and pretty high it is, too.

Mr. Wilson: Turning back to your Columbia street lots again. The ground now is not in its natural condition is it, in which you bought it. A. No, it is not.

Q. Has it been built up at all there? Is it terraced? Is there any more ground put there? A. No; no more ground put there, but it is in different shape. I had flowers before, but I have none there now.

Q. Let me ask you one thing: Take the land at the back of your house. Is that in its natural condition? A. No, sir.

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Q. Is that built up, at all? A. I worked at that to fix it as is now. I dug it.

Q. That is lot 7. How far back did you dig it? A. I dug it the whole way back.

Q. On lot 7? A. To where the house is built. I dug it up to the line, and put down a big shed there inside, and quite a lot of clay inside; built a shed inside the fence.

Q. How much did you take off the natural surface of the earth? A. Well, I took out considerable at one corner and some over at the other side.

Q. At which corner was it you took it out? A. In the north corner. I brought it over to the west and south side.

Q. Mr. Wilson: I propose to use a map, my lord, and if my friend will not object, I will prove it afterwards, or I will put the witness in the box now, if you wish.

Court: Yes. Mark the maps "A" and "B."

Wm. Noot. Called and sworn.

Examined by Mr. Wilson.

Mr. Wilson: At present all that I propose to do is to prove that that map is a true copy. I am not going to submit my witness to cross-examination at present.

Court: No; let Mr. Noot be called for the purpose of proving these maps, and reserve the cross-examination about other matters.

Mr. Wilson: I will undertake to put the witness in the box afterwards, generally.

To witness: Your name? A. William Noot.

Q. What is your occupation, Mr. Noot? A. City Engineer.

Q. Did you make this map produced now? A. I did.

Court: "B" is a copy of "A?"

Mr. Wilson: Yes.

James McNamara, recalled.

Cross-examination by Mr. Wilson, continued.

Q. This is supposed to be a map of your property, Mr. McNamara; that being

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Columbia street and these two lots are your lots on Columbia street. This one differently colored is your lot on Armstrong street. First, of all, I want you to tell me whether the land facing Columbia street is in its natural condition? A. Well, it is in its natural order.

Q. Haven't you raised the ground in front here? A. No, sir; never, except some manure, somethi ig of that kind—black stuff that I got.

Q. It is now as when you bought it, then? A. No; it was in a bad state when I bought it.

Q. Don't misunderstand me. Is it as high now as it was when you bought it? A. It is in back, but not in front.

Q. This part in front here, is that about the same height as when you bought it? Has the surface been lowered? A A portion of it is the same height as when I got it.

Q. And the rest you sloped down towards the stone wall? A. No; I never put any towards the stone wall at all, only some flowers and stuff that I throwed back from the wall.

Q. Have you cut down the ground here or lowered it at all? A. I lowered some of it next the fence up here.

Q. Shew me the part? A. Up from here; it was high from here

Q. How is it here, back of lot 8? A. Well, I done that much.

Q. It is now as when you got it? A. No; it ain't raised any.

Q. Is it lowered any? A. Well, if anything, it would be lowered.

Q. How is it here, at the back of lot 7? A. Where I dug down, it is lowered.

Q. Tell me where that was? A. About this point.

Q. Near the boundary of lots 7 and 8? A. Yes, back at this corner. This side was low all the time, and that side was high.

Q. There was a little knoll here? A. There was a little knoll, and I cut it down and divided it towards the fence.

Q. The knoll between the boundary of lots 7 and 8? A. Yes, I removed a piece up at this point, and put it along at this side.

Q. On the Merrivale street side? A. Oh, no; it was the Merrivale street side. I put it towards Harvey's.

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Q. You? A. I put it alongside Harvey's fence.

Q. How much has the street been cut down? A. This is not the lot I am living on at all. This is the lot I cut out somewhere round here.

Mr. Wilson: My lord, this is all wrong. He has got the thing mixed up here. (To witness): This is lot 7? A. Yes.

Q. And this is lot 8? A. Yes.

Q. Let me begin again. Lots 7 and 8, did you cut those down, or raise them? A. I never raised them at all. I sloped them towards Columbia street.

Q. They are about now, then, the same height as they were when you went there? A. They are not as high, towards the fence.

Q. Did you build the house on those lots? A. No, sir; Mr. Hoy built this one.

Q Lot 8? A. Yes.

Q. Do you know who built lot 7? A. I do not. Mr. Brew (?) had it built in the first place.

Court: When Mr. McNamara says that Mr. Hoy built it, he means he was the architect. Mr. Michaud was the owner? A. Yes, my lord.

Mr. Wilson (to witness): At the back of this lot, you say there was a knoll? A. Yes, it was a rough spot there.

Q. Which ground you took and put along between your lot and lot 9? A. Yes, Mr. Harvey's.

Q. Is the back of the lot in about its natural condition? Did you dig that down, or raise it up, or do anything to it? A. Not much; there is some cut away from it; very little.

Q. Was there anything cut away from this part of lot 8? A. I built a wide shed all round it about 9 feet, and I had to throw it out this way, and that left only a very small corner to clear away. I had to drain all that.

Q. How much was the street lowered from the corner of Merrivale street to the western end of lot 8? A. The street?

Q. Yes. A. That is Columbia street?

Q. Yes; how much was it lowered? A. Well, I could not say how much it was.

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Q. Isn't it a fact that it was not lowered at all? A. Well, they were working there.

Q. But it does not follow that they cut it down? A. What were they working there for?

Q. Putting in a new sidewalk generally. But did they cut it down? A. I could not say. I would not swear that they did.

The Court suggests viewing the property.

Mr. Wilson: Mr. McNamara is perfectly straight about it. He won't say it is cut down? A. I say nothing at all that I don't know to. They were cutting down and filling up there back and forward. They cut down and filled up again in some places there.

Re-direct by Mr. Jenns.

Q. Mr. Wilson asked you why you did not start your suit sooner. When did you first make your claim to the Council? A I could not exactly tell; it is a long time ago. Mr. Kelly made the application to them, and then these three men went up to me one day. Three times I asked Mr. Kelly "did you hear anything about these gentlemen?" "No," he says. "Well," I says, "you see Mr. Jenns, and see if he can't get them to acknowledge something.

Adjourned to 2 p.m. for the Court to view the property. Court to reassemble at 2:30 p.m.

AFTER RECESS.

JAS. MCNAMARA. Recalled by Mr. Jenns.

Mr. Wilson: I am satisfied with the deeds, my lord. He is not required to produce the deeds. That is, I want the deeds kept, and produced during this trial at any time.

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Mr. Jenns: You do not want to take them away from the rest of the papers. I will give you my personal undertaking to produce them at any moment you want them.

Mr. Wilson: That is all I want.

Mr. Jenns (to witness): You are in possession of these lots, are you not? A. Yes, in possession of the deeds and everything else belonging to it, and paid for them.

— Robson. Called and sworn. Examined by Mr. Eckstein.

Q. You are city clerk, Mr. Robson? A. Yes.

Q. How long have you occupied that position? A. Since Dec. '88.

Q. Do you produce any contract relative to the grading of Columbia street? A. No, as far as I know.

Q. In front of lots 7 and 8, block 17? A. As far as I know, there is not any. I believe it was done by day labor under the street foreman.

Q. Who carried out the improvement on Columbia street opposite lots 7 and 8? A. I don't know what you mean by that question.

Q. Did the corporation or any contractor in its behalf carry out the improvement? A. The corporation I believe. I believe there is no contract.

Q. Who paid the laborers? A. The corporation, I suppose.

Q. Who directed the work? A. Well, I really could not tell you that. I don't know whether it was under the city engineer, or whether it was the chairman of the Board of Works.

Q. At all events, it was carried on under the instructions of the corporation? A. Well, as far as I know. I could not say positively.

Q. Could you be more positive by reference to the minute books of the Council? A. If I had time, but if you will allow me to say, I was asked to produce all minutes and the resolution, but the subpœna was served on me only ten minutes before the Court sat, and I could not possibly look at the books.

Mr. Eckstein: If my friend will admit the carrying out of this work by the corporation it will obviate the necessity of producing these books. That the corporation carried out this work.

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Mr. Wilson: On these streets.

Mr. Eckstein: Yes.

Mr. Wilson: Certainly; we admit that the corporation carried out the work.

Mr. Eckstein *(to witness)*: Did you at any time since 1888, or since the work commenced, receive any objection to the work being carried on? A. Well, I really could not remember. I don't remember receiving any, but there might have been.

Q. Did Mr. McNamara at any time, either by himself or by his agent, make application to the Council for compensation? A. I don't remember.

Q. Do you produce any letters from Mr. McNamara or his agent relative to compensation for excavation? A. No; for the same reason I did not produce anything else—I had no time.

Mr. Eckstein: My lord, I must ask that the examination can be deferred until the witness can produce those.

Court: Which are those?

Mr. Eckstein. The application of Mr. McNamara for compensation.

Court: Have you given notice for them to be produced?

Witness: If your lordship pleases, there was a notice given; this was served on me ten minutes before the court sat, and I must look over for two, three, or four years.

Court (to Mr. Eckstein): Can you not defer this?

Mr. Eckstein: Yes, I cannot continue now without the production.

Court: Certainly defer it.

Mr. Eckstein: And I also wish Mr. Robson to produce the document signed by Mr. McNamara with reference to referring the matter to arbitration.

Mr. Wilson: I submit that that is not evidence.

Mr. Jenns: Produce all papers.

Mr. Eckstein. I take it subject to my friend's objection; but I think I have a right to ask for it. It is especially important in this respect that my learned friend has made the objection that no claim was made until the matter had become very stale, and I want to shew that such is not the case.

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Court: I am not prepared to say at a moment's notice that your learned friend is bound to produce that, but supposing that he does not produce it, you can then apply to give evidence that such an offer was made, when I can rule whether that evidence is admissable, or not. It may be admissable in the direction to shew that this claim was not the result of an afterthought, inasmuch as the learned counsel has cross-examined about the Brighouse case it may be desirable to shew that, although there is no jury. But for my part I cannot help saying, dealing with it as a judge, that to my mind it is a matter of most supreme indifference whether the matter was dealt with before the Brighouse claim, or whether Mr. McNamara was ignorant of his legal rights, if he has any. I cannot say he was guilty of undue delay. There does not appear to me that the Plaintiff has implied acquiescence by reason of anything he has done.

Mr. Wilson: I may say, my lord, I do not attach any importance to that.

Examination continued.

Mr. Eckstein (to witness): You keep all the minutes of the Council? A. Yes.

Q. Has Mr. McNamara ever signed any document acquiescing in the right of the Council to make these excavations and improvements on Columbia street? A. Not to my knowledge.

Q. Is there any record on file among the papers of the Council shewing that he has done so? A. Not that I remember.

Q. Could you speak more positively if you had an opportunity of searching among the papers? A. I suppose I could, although there might be some papers that are not in my custody. Sometimes papers are handed to committees and not returned to my custody, but I have no recollection of anything of that kind.

Q. Was there any contract between Mr. McNamara and the Council under seal, by which Mr. McNamara allowed these improvements to be made? A. Not to my knowledge; I never heard of such a thing.

Q. By reference to records in your office could you be more positive as to whether such a fact exists? A. Well, I feel quite sure,—that is if it was under the seal of the corporation the seal would be attached to it—and I am quite sure I never saw the seal.

Q. I may explain, I want to know positively.

Objected by Mr. Wilson that Counsel is cross-examining his own witness.

Mr. Eckstein: I have asked the witness to produce certain papers, and he

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cannot do so, and in evidence the witness is not positive. I shall ask for the examination to be adjourned so that he may go and search among the papers. On the other hand, if the witness' evidence is positive no such papers exist, a search is unnecessary.

Mr. Eckstein (to witness): Can you say whether any such paper is in existence—a paper signed by Mr. McNamara, or on his behalf, in which he allowed the improvements to be made, and acquieseed in them? A. I have no knowledge of such a document.

Q. Are you positive that none exists? A. Well, I cannot say. It is a matter that has run over a good many years.

Mr. Eckstein: I ask that the examination be adjourned so that he can be positive.

Court: I have no doubt that if a reasonable time were allowed, you could find or look them all up? A. I have no doubt, my lord.

Mr. Wilson: After all, it is only negative evidence. He can only say they are not among my papers. They don't find the evidence they want until a few minutes before coming into court.

Court: Very well, Mr. Robson, will you kindly see if you can find the papers, and we will take your evidence later on.

Wm. Noot, called and sworn.

Examined by Mr. Eckstein.

Q. Do you produce the profiles of Columbia street so far as they refer to that street opposite lots 7 and 8, block 17? A. In reference to the improvements carried on there?

Q. Yes. A. No, I do not.

Q. What have become of those profiles? A. I cannot say I never saw them.

Q. Were the improvements carried on without profiles? A. I cannot say. They were carried out before I came here.

Q. Do you produce the specifications under which those improvements were carried out? A. I have no papers whatever referring to the work.

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Q. Are you then in this position that you can state nothing one way or the other with reference to the work? A. Not at the time they were being carried out.

Q. Can you state what the grade of Columbia street was prior to the improvements? A. No, sir.

Q. You can state what it is now and that is all? A. Yes.

Q. Can you state anything relative to the improvements on Armstrong street? A. No, sir.

Q. You have no profiles of these improvements? A. I have no papers whatever of work carried on previous to my arrival in the city.

Q. Is it customary for the city engineer to make profiles before carrying out improvements? A. I always prepare profiles.

Q. Were any profiles prepared before your time in reference to any street? A. How am I to know that, sir? I don't know anything about it.

Q. You have not searched to find whether there were? A. No papers were left in the office when I came there.

Q. Do you mean to say the office was without any papers? A. Very nearly.

Q. Will you explain to the Court how the grade of Columbia street was established? A. What grade are you speaking about now?

Q. The grade in front of these two lots in question—lots 7 and 8. A. Previous to my arrival here?

Q. Yes. A. No, sir; I could not.

Q. What is the established grade? A. A bench mark at the post office.

Q. How do you know that that establishes the grade? A. Well, it is the bench mark that we work from.

Q. You were told that that is the case? A. No, sir; well, that is, we have a reference to that on the existing maps. That is our law book, sir, to start from. That is our base, the lines seen at the corner of the post office.

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Q. How long has that bench mark been there so far as you know? A. I could not say.

Q. Do you suppose this last 6 years? A. I could not say.

Q. Three years ago? A. I could not say.

Q. Might there not have been another bench mark there 7 years ago? A. I don't know sir.

Q. If there had been another bench mark there seven years ago the grade might have been different? A I don't understand your supposition at all, sir.

Q. You say you work from a certain bench mark near the post office? A. Yes.

Q. If that bench mark were changed in any respect, would the grade be changed? Explain what a bench mark is? A. Simply an altitude above high water mark, and that is the way we take the bench mark at the post office, just 34 feet above high water mark. High water mark is established, I suppose, by the old ordnance surveyors when here many years ago, and maintained ever since.

Q. And you don't know why it was put there? A. Well, I suppose it was reduced to that point by some former surveyor for the city when laying it out; but I don't know—we always accept that kind of thing everywhere.

Q. And the grade would have been made from that? A. From that, now.

Q. And the grade from that would have been made ten years ago? A. I don't know; I would rather not say.

Q. It should have been? A. I don't know. I have worked from that ever since I have been here.

Q. And if that bench mark had been there ten years ago, the surveyors would have worked from that, also? A. I should not like to give data for former surveyors.

Q. If you had been here ten years ago, you would have worked from that? A. Quite so.

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Mr. Wilson: I will not cross-examine, but I will examine him by and bye as my own witness.

— Morrison. Called and sworn.

Examined by Mr. Eckstein.

Q. You were at one time, Mr. Morrison, the owner of lot 7, block 17? A. Yes.

Q When did you first occupy that lot? A. Near 20 years since, I should think.

Q. Do you know when the house on lot 7 was built. A. I do not.

Q. Was it a new house at the time you occupied it? A. Oh dear no.

Q. Who constructed the fence in front of that lot? A. I had it done.

Q. How long ago? A. Must be 14 or 15 years ago.

Q. Did you take any steps to ascertain the line of the street at that time? A. We had to build from a line. I can't remember what the line was, but I think it was a post at the corner of the fence, but it is so long ago I cannot distinctly remember, but we had something to go by, of course.

Q. You got the line from Mr. Turner?

Objected to by Mr. Wilson.

Q. From whom did you get the line? A. I don't know, I think it was a post that was stuck in the corner that we went by. I think so.

Q. Who was city clerk at the time? A. I was.

Q. Was Columbia street open at that time? A. Oh, yes.

Q. Was it graded? A. They were grading it just about the time I put up the fence; that was the cause of it. I think it was somewhere about that time.

Q. After you put up your fence, did the city ever take any steps to re-grade it? Was anything done towards improving Columbia street? A. I don't remember.

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Cross-examined by Mr. Wilson.

Q. Do you remember the height of the crib at the corner, say from the then level of the street? A. Before the alteration was made?

Q. That would be when you lived there. You owned the property, you know? A: Yes.

Q. Take it at the corner of the street, what was the height of the crib work you had there? You had crib work? A. Yes. I had crib work. I think it must have been 7 feet, perhaps more.

J. W. Harvey. Called and sworn.

Examined by Mr. Jenns.

Q You know the lots occupied by Mr. McNamara. A. Yes, sir.

Q. Do you remember the old fence that stood there, before? A. You mean before the road was cut down, at all?

Q. No; I mean the — A. —the old fence?

Q. The old fence when Mr. Morrison and others occupied the house? A. Yes.

Q. Do you remember when that was built, or about? A. No, I could not say.

Q. It was built before 1877, was it not, Mr. Harvey? A. It was built before Mr. Ellard died, in 1878.

Mr. Jenns: To go back a time further before that fence was built had the road been graded in front? A. It had been cut down.

Q. And the fence was built how? A. That was on the line of the road, where the Council had cut it down.

Cross-examined by Mr. Wilson.

Q. You have an action against the corporation, Mr. Harvey, havn't you? A. I have, sir.

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Q. You are suing them for damages? A. I am.

Q. In the same class as the action now pending? A. I don't know exactly the same class; for putting up a stone wall.

Court: It is on lot 9? A Yes; on lot 9—the next lot.

NOTE:—With respect to the evidence to be given by the witness Robson, who is to be called at a later stage of the case to produce documents in his custody, and to give evidence touching his knowledge of the matters in question—subject to the above, the case for the plaintiff is closed.

Upon Mr. Wilson moving for a non-suit, Court noted the application, and granted leave to move for and argue upon same upon the motion for judgment.

Wm. Noot. Called.

Examined by Mr. Wilson.

Q. From what is that map of the district taken? A. It is the enlarged plan from the old official plan of the city

Q. Have you got that plan? A. No, sir; but it is the accepted plan of the streets.

Court: The official map? A. Yes.

Mr. Wilson: The official map? A. Yes, and it is signed by his lordship.

Q. What I want to establish is that it is a correct copy of the official map? A. Yes.

Q. An enlarged copy of the official map A. It is.

Q. Perhaps you will be good enough to explain to his lordship with respect to the grades taken down, shewing the altitude from one point to another on that map? A. If you follow this line of levels and you notice the altitude below the cribbing there at that first point. We are dealing with 7 and 8. I will just say that this is really a profile from point A to B, and then if you will kindly follow this level you will find that at the foot of the cribbing there—I will just call the value in feet—it is 54.20, and then above the cribbing it is 70.70, or a rise of something like 16ft. there. Then you take the centre of the street, at 74.40, and then

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at the foot of the wall—Mr. McNamara's wall you will find it is 75.60 and on the wall 80.60, and then if you follow up to the back of the property you have got 100.7 (?) and a dotted line to shew that the level of the and the level of the property are exactly the same at that point. Then I want to draw your attention to this point. From that point again I am taking a level at the side entrance. If you notice, I have scaled that carefully and produced that profile, and you will see I have shewn the rise of the cribbing there, also the rise of the wall, and the exact declivity of the property at the back. And I want particularly to draw your attention to this fact, that we have that original ground at that point on the property, because we have large trees growing there that have not been moved for the last 20 years, and I want you, my lord to notice that we have taken that as the original ground. From that point I have produced that line to below the cribbing, and I have drawn that, my lord, from there and there you have the original line of the ground previous to the original breaking up of Columbia street. And on the face of that, if you notice there was never any cutting made at the corner of that property, it was not necessary. I also say distinctly that this elevated mound for ornamental purposes, that bank in front of Mr. McNamara's wall. He had no occasion to build that wall; it is not required for any special purpose, and therefore it is entirely with the owner why that is put up.

Court: You say that if it had been cut down from the natural ground—perhaps I do not express myself as technically as you do—but if it were cut down from the natural grade then it would be a question whether the city should pay for the wall which is necessary to support the land in its natural position?

Witness: Just so.

Q. But inasmuch as this principle applies to land with an artificial increment, which comes in and was not originally there, and was simply used for the pleasure or otherwise of the owners of the land, that the city should not be called upon to pay for the embankment which he placed there in making an artificial platform above the normal grade, and which would not be required at all? A. That is exactly what I believe it to be, and that is just it, that the wall is not required for any purpose whatever; it was simply to support a mound put in there to beautify and ornament the house.

Q. And to follow out the same line of thought, had this artificial increment not been deposited here there would have been a natural slope and rise here between this point and that point at the back and front which would render any such wall unnecessary? A. Quite so. And to make my argument a little more substantial, there was a stone put in there previous to any work being done, either cribbing or any work, by Mr. Turner, and that stone is there now, and the grade has never been changed.

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Q. I think that stone had some reference to what is called the artificial base line? A. Yes, as established by statute. Then, my lord, I have nothing more to say with respect to 7 and 8, and if you please, I will go on to lot 4. In taking the levels again I took the ground again, on lot 9, and I say that that is the original line, the original ground there, and there we have the level of 88.70, and then, immediately on the road just outside the fence, we have 91.20.

Q. A difference of 3, about? A Yes; and then we go across to the properties on the opposite side, and we have then 92.90; we have 97.90, and about the same rise. I want to draw your attention to this fact, that you take lot 3, adjoining lot 4 there is the same rise, about 3 to 5 feet, and then if you take lot 3 you will find a sudden drop of 3.60 to Mr. McNamara's lot 4 down to lot 3, and if you come to the west end of lot 3 you will find that the sidewalk and the lot are exactly level, and if your lordship was up there to-day, you saw stumps of trees growing there that have never been moved, and there now to-day, and I say distinctly that piece of ground has been raised up to build up the wall and to beautify the property. A wall there is not necessary for roadmaking, and I can prove distinctly by the original levels below here that the sidewalk is higher than the original ground.

Q. I have used the words "artificial increment." Had it not been again used in lot 4, and the natural angle of the land left as it was, and unchanged by the addition of other soil, for the purpose of making an efficient road along here it would be unnecessary to build a stone wall? A. Quite so, my lord.

Q. But the addition has been made simply for the benefit of the owner; and then comes another question with which we have nothing to do just yet. How far is the owner entitled to the support for material added to the natural land?

Mr. Wilson: That is a point of law, my lord.

Court: Yes, but I want the better to crystallize the matter, as by and bye, when I want to have the benefit of the notes, there can appear upon them this point. Witness: I want to press this on you very firmly—the level of lot 3 to-day. There is no wall there yet, and yet they have put crib work on a cap of artificial earth running through.

Q. You rely further upon that as being artificial soil, and without additional excavation of the soil it would not be falling over? A. Certainly; and also upon the fact of the old forest—the stumps of trees appearing there to-day.

Cross-examined by Mr. Eckstein.

Q. What reason have you for saying that this is the original soil? A. This, the fact that very old trees are growing there to-day, and looking at the nature of the soil, and the soil below here, the cribbing, and the grass growing there, and so on.

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Q. What age would those trees be? A. I could not say, but they seem to be pretty old.

Q. They are fruit trees to which you refer? A. They are fruit trees, yes.

Q. Do you suppose fruit trees could be transplanted at the age of 20 years? A You are ng me a question that is rather out of my line.

Q. But you base your calculations upon the fact that there are old fruit trees there, but those fruit trees might have been transplanted, for all you know. A. They might have been.

Q. If you had been told they had been, would you still adhere to the same theory? A. Unless I had sworn evidence that they were, I would not believe a man simply making the assertion.

Q. And you say that the soil on the south side of Columbia street is still the original level? A. There is a doubt of that.

Q. In bringing Columbia street I may term it to a level, wouldn't you take the earth from the north side and fill up on the south side? A. I think not.

Q. How would you do? A. Because in this way—you must always have reference to streets above. If that street is going through, and only that street, then I certainly would remove from the upper side to fill the lower, but seeing I have got to make connection with the intersecting streets, I should say certainly not.

Q. You are speaking from what you call theory? A. No, no theory.

Q. Will you tell me as a matter of fact where the soil on the south side of Columbia street? A. I could not say that.

Q. That is still a theory of yours. Where do you suppose it came from? A. I don't know.

Q. Are you sure it did not come from the north side? A. Sure.

Q. Why? A. From the surrounding streets, and the street above, and as an old surveyor.

Court: He finds with respect to a certain lot that there was a certain level on the front street, and then you follow that out to what is the next natural level on Columbia street, and then the natural level of the bank and then a natural level about 66 feet from the bank, and, having compared them, he comes to the conclusion that the front piece is not the natural level, but so and so, and he mentions it, and that compared with the level of the bank shews us distinctly that it is the natural level or so nearly so that it should not be interfered with in filling up the artificial increment of the lot?

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Witness: That is exactly it my lord, if you will allow me to say one thing more. I had overlooked one fact that will perhaps substantiate what I have just been saying. You know there is property on Columbia street belonging to Mr. Edmonds, lot 10. There, my lord, you have the line of the land exactly from Arm-street right through to Columbia street, and it has never been changed; the old fence is there to-day, and the line of the land is exactly down on the sidewalk, and they are both together.

Mr. Eckstein: What is the age of that fence? A. I should think it must be from 16 to 20 years to-day.

Q. Might it not have been moved? A. It might have been moved, but not since within the last 15 years.

Q. What is the grade from Mr. Edmonds'? A. Mr. Edmonds', just inside the fence is 65.30; outside the same There is a rise of 10 feet exactly from that point to Mr. McNamara's corner.

Q. And you mean to say that if Mr. Edmonds shews the original land, therefore all the lots along Columbia street must be based upon Mr. Edmonds' lot? A. No, sir; I am simply saying there we have the old line of the land pure and simple; no embankment made there.

Q. But the physical features of one lot are very often different from the other. You base everything on scientific theory? A. No, sir.

Q. How do you speak as to the facts without knowing the facts? A. Well, I know this to be the fact—that the surveyor putting that stone down would not dig it up again to put that shaft (?) in, and that was there previous to the embankment being made, or the fence.

Q. If it were decided to lower Columbia street 10 feet, would you prop it up by stilts so as to keep it on the same line? A. No, sir.

Q. How do you know it has not been moved? A. I am sure it has not been moved, because I should have seen a record of it in the office. That is not the surveyor's stone; it was put in by order of the Government, and not to be tampered with, and we might find an error in that stone or another, and we are not allowed to touch that stone. They are there, I believe by statute, and we are not allowed to interfere with them either to lower or to lift them. They are there, and unless you get an order from the Council lift or lower them, you cannot interfere with them. It was put in with reference to the line of the street and to shew the grade at the time it was put in.

Q. Nothing with reference to the grade of the lot? A. Oh, dear no, sir.

Q. Have you any record in the office as to that stone being put in there?

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A. Only on the official map, where the stone is shewn, and also giving the offsets and all road lines.

Q. Would it surprise you to learn that this street had been at any time cut down in front of lot 7? A. It would surprise me; I don't believe it has ever been cut down.

Q. You believe that is the original grade? A. At that corner, I honestly believe that that has never been changed not 3 inches one way or the other.

Re-direct by Mr. Wilson.

Q. I understand you to say, Mr. Noot, that there is an ancient forest growth below the cribbing on Columbia street? A. Yes.

Q. And an ancient forest growth, too, on lot 3? A. Yes.

H. Hoy. Called and sworn.

Examined by Mr. Wilson.

Q. Your name is? A. Henry Hoy.

Q. In 1890 were you a member of the City Council, Mr. Hoy? A. I was.

Court: Chairman of the Board of Works? A. Yes.

Mr. Wilson: Were you the chairman of the Board of Works? A. Yes.

Q. And had something to do, as chairman of the Board of Works, with effecting the improvements which were then made on the streets? A. Yes, sir.

Q. And on Columbia street had you superintendence of the work? A. Yes, and altogether, with the Board of Works.

Q. Did you have any conversation with Mr. McNamara—

Mr. Eckstein objects that any conversation between the plaintiff and witness irrelevant, the authorities shewing that Mr. Hoy could not have made a contract on behalf of the corporation; and that conversations with individual mem-

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bers of the Council could not be binding upon either party.

Court: I cannot at this stage say whether it is admissible or not. It may be, after he has given it, I shall find it inadmissible, and, if so, I will strike it out again.

Mr. Wilson *(to witness)*: You had, I understood you to say, a conversation with Mr. McNamara about the work? A. Well, I might state, if you will allow me, there was a resolution passed in the Council that the work was to be done by day's work to widen the street and put a new sidewalk down. I suggested to Mr. McNamara and others on that street that if they would put the fence on the line we would make the street the full width and make a good job of it. That is about all the conversation I had. I merely suggested it.

Q. You suggested to them that if they put the fence on the line the corporation would effect the improvements? A. Yes; it was quite a new sidewalk, and we didn't like to put it down without.

Q. Was Mr. McNamara's fence put back? A. Yes, sir. It was out about 20 inches on the street.

Q. Do you know who dug out the ground to enable Mr. McNamara to build his wall? A. Mr. McNamara did that himself.

Q. Did he do that on Armstrong street, too, do you know? A. I believe not; I think the corporation men did.

Q. Took out some ground there to enable him to build his wall there? A. I might say, in answer to that, the foreman at that time told me Mr. McNamara asked him to let him take out two feet of that, and I told him—

Objected to by Mr. Jenns. Objection allowed.

Mr. Wilson (to witness): So that what you did on Columbia street you did with Mr. McNamara's permission? A. We didn't take anything out of his lot on Columbia street. Mr. McNamara dug his own.

Q. Well, did you do anything more than suggest that to him? A. That was all.

Q. You understand what I mean?—he says you ordered him to do it. Did you? A. No; I had no authority to order anything.

Q. You gave no order, as a matter of fact? A. I gave no order.

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Q. You suggested it to him, and he yielded a ready assent?—is that it? A. Yes.

Q. It was in consequence of the resolution of the Council that you went to see Mr. McNamara in common with other owners? A. Yes.

Q. The Council, I take it, would not have done the work if assent had not been given to it.

Objected to by Mr. Eckstein. Objection sustained.

Cross-examined by Mr. Jenns.

Q. Mr. Hoy, did you not in the first place tell Mr. McNamara that his fence would have to be cut down? A. No.

Q. When was it that you first saw him about the matter? A. It was just before we commenced work. I could not give you the date. It was in 1890.

Q. Had the other property owners along the street been seen at that time? A. I spoke to Mr. Edmonds first, and I think Mrs. McGinnis asked me one morning if we were going to do anything.

Q. Had they given their assent? A. Mrs. McGinnis volunteered to do it.

Q. And what about the others? A. Mr. Edmonds told me to send a man to see what it was going to cost.

Q. About Mr. Harvey, did he give his consent? A. No.

Q. In fact, he sent in a letter protesting against it, didn't he? A. Well, he was the last one that came in, and then he came to me afterwards and asked if I would do the grading, and I said that I would.

Q. Was that after or before this letter of protest was written? A. I don't remember any letter of protest, Mr. Jenns.

Q. Was it before or after you spoke to Mr. Edmonds that you spoke to Mr. McNamara about it? A. It was after, I believe. I am not positive, but I believe it was. Probably the same day. I would not be sure.

Q Do you remember his standing on top of the bank, or where was it that you spoke to him about it? A. Oh, I don't know; it might have been in front of his premises.

Q. But you are quite sure that you did not first tell him that the wall would have to be cut down? A. I am positive I never told him that.

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Q. He had some rose bushes and flowers in front along the edge of that wall, hadn't he? A. Yes.

Q. Was anything said about that at the time? A. No.

Court (to witness): What would be the value of the stone wall along 7 and 8? —you know the stone wall? A. Yes, my lord; I never figured that up.

Q. Nor on lot 4? A. To make a comparison, in front of my house it cost me about $100.00 a chain.

Mr. Eckstein: What is the height of your wall? A. It is 4 feet.

Q What thickness? A. Ten inches, I presume.

Q. What kind of coping? A. It it cedar coping.

Court: Would the stone coping be more expensive, Mr. Hoy? A. I expect it would be.

Mr. Eckstein; What is the height of Mr. McNamara's?

Objected to by Mr. Wilson as being cross-examination by two counsel on the same side. Sustained.

Court *(to witness)*: It is all the way between 4 and 5 feet high? A. I should say so.

Q. What difference would the stone coping make by the chain? A. I could not say.

Mr. Wilson: There is one question, my lord, which did not arise in cross-examination which I was going to ask permission to put, and that is as to the character of the improvements on Columbia street?

Court: Yes, is the property improved by what has been done, or depreciated? A. It must have improved it, I should say.

Mr. Wilson: Is it not a fact, Mr. Hoy, that Columbia street, by reason of the work then done, is greatly improved? A Yes.

Q. And Columbia street in front of those lots?—is or is not that greatly improved? A. It is improved, yes.

Q. Was not a large sum of money spent that year by the city on this work?

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A. Yes; quite a large sum of money, the street was widened out twice the width.

Q. Will you tell us what was done in front of Mr. McNamara's lot on Columbia street? A. From memory I should state that the street was not more than 50 feet wide at that corner. It was made the full width of the street—99 feet. And the grade was made higher; there was a little falling down in front of Mr. McNamara's, but no cut.

Q. And was the cribbing built on the lower side of the street? A. It was built that way, yes.

Q. Do you know the height of that cribbing?

Mr. Jenns objects to what is practically re-examination upon new matter.

Witness: Sixteen to 20 feet, I should say.

Objection sustained.

Mr. Wilson: I ask your lordship's permission to ask this witness with respect to the improvements that had been effected there?

Court: What you want to get at, as I understand it, is this—that there has been a general improvement there instead of depreciation?

Mr. Wilson: And that even assuming that the plaintiff is entitled to recover the damage—

Court: Don't go any further. (To witness.): To what extent should you say that property has been damaged by the changes made in the street?

Mr. Jenns: Of course I cannot object to any question put by the Court, but am bound to in this way, that even if on direct examination, the question could not be put by my learned friend, because it was ruled in the Brighouse case that if the value of the property is increased by the general improvement on the whole length of the street, it could not be taken into consideration.

Mr. Eckstein: If your lordship pleases, there is no counter-claim for improvement in value.

Court (to witness): You knew the property in 1890? A. Yes, my lord.

Q. It was worth then $4,000.00—for the sake of argument—how much less is it worth now A. I could not say. I should say it was not worth any less

Q. Would you say it was worth any more? I am not speaking now with reference to the hard times when money has ceased almost to be a thing that is known in the country, but assuming that it is ordinary business times, would you say that

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the property is worth more or less? A. Well, I should say the improvements that have been made on the lot have improved the value of it.

Mr. Wilson: What I want to get at, my lord, is that immediately in front of Mr. McNamara's house there have been improvements effected to the value of how much?

Witness: I could not say.

Q. One, two, three hundred dollars?—what do you think?

Court: I think, Mr. Wilson, that you may leave that to me. I have travelled up and down that street four times a day for 12 years, and during that time I have made a tolerable acquaintance with the geographical peculiarities of it.

Wm. Beadle. Called and sworn.

Examined by Mr Wilson.

Q. Your name is? A. Wm. Beadle.

Q. And you live in Surrey? A. I live over the other side—in Surrey.

Q. What is your occupation? A. General mason.

Court: Do you know this wall in front of where Mr. McNamara lives and in front of the house of the gentleman who lives next door? A. Yes; I know it.

Q. What would it cost to build that wall?—there are 132 feet of wall.

Mr. Jenns: No; more than that, your lordship.

Mr. Wilson: You built the wall, did you, at the corner of Merrivale and Columbia streets? A. Yes, sir.

Q. How much of it? A. I built two chains, less 10 feet.

Q. How much were you paid for that? A. Five dollars and a half a cubic yard.

Q. How many cubic yards were there in the whole of it? A. Thirty-six.

Q. The height from the ground there, on Columbia street, was what? A It averaged 5.9 inches.

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Q. And the height on Merrivale street? A. Averaged 5 feet.

Q. And the thickness? A. Eighteen inches.

Q. Did you find all the material? A. Found all.

Q. Labor, and everything? A. Labor.

Q. Did you also build the wall on Armstrong street for Mr. McNamara? A. No, sir; but I made a tender of it for the man that did. I might say that it came to $198.00, and Mr. Kelly, his agent, was a week before he would pay me, and he paid me $195.00.

Q. You say you measured the wall on Armstrong street? A. I made the tender out for the man that built it.

Q. And you know the dimensions upon which you tendered? A. Five dollars a cubic yard.

Court (to witness): How many feet were there? A. It measures on that return, 2 feet on the coignes on each end, and there is a break for a gateway.

Q. What would it total up? A. Eighty feet in length; there is 22 cubic yards and 7 feet in the wall.

Q. At how much a yard? A. Five dollars and a half a cubic yard. I made the tender of it, and he told me he got that price.

Q. What did you get paid for it? A. Well, it was another party that built it. I made the tender out for him; a man that was working for me at the time.

Mr. Wilson: Were those prices which you were paid fair prices? A. Yes; good prices. I could make more than wages; did do.

Court: It is about $198.00 on 7 and 8, and about $122.00 on lot 4.

Mr. Wilson: And you made about $6.00 a day on it? A. Yes; cleared about $6.00 a day.

Cross-examined by Mr. Jenns.

Q. You say that on the Columbia street wall you built 122 feet? A. I built on the Columbia street wall—well, there is a chain on Columbia street, 16 feet on Merrivale street, and the break of the gateway makes 10 feet; that makes it altogether, 2 chains less 10 feet.

Q. Who built the balance of the wall? —how much wall is there on Columbia

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street? A. Two chains.

Q. Who built the balance? A. Mr. Smedley.

Q. Do you know what was paid him for that? A. He was paid $4.00 a cubic yard for doing the labor and finding the mortar, and the man that found the stone was paid 4.00 a cubic yard. At the time, there was a dispute between McNamara and Smedley about the quantity of cubic yards it contained; they could not agree and called me to arbitrate it, to settle the question, and I went down and measured the wall, and found it 22 feet less I gave it nigh enough for 22 feet, so I suppose it was settled.

Q. There would be 22 cubic yards in that, and there were 36 in what you did? A. Yes, sir.

Q. And how many cubic yards in Armstrong street? A. There is 22 cubic yards and 7 feet.

Court: Do you mean to say there are another 22 cubic yards in Columbia street?

Mr. Jenns: Yes; the evidence given by my learned friend only concerns lot 7, not lot 8.

To witness: So that would be 58 cubic yards, at $5.00 a yard, and 22.75 you say was $5.50 a yard? A. What I did, I had $5.50 for, and the other, it cost $8.00—the first 22 cubic yards cost $8.00.

Q. Eight dollars a yard? A. And the 36 that I did.

Q. Was $5.50? A. Five dollars and a half.

Q. And then there were 22 yards and 7 feet on Armstrong street that another man did; that cost $5.50? A. Well, he told me that he had that price. I made out the tender.

Q. And he afterwards did the work? A. Yes.

Court: I understood right through that it was $5.50 the amount per cubic yard on lots 7 and 8, and now he talks about $8.00?

Mr. Jenns: Yes; there were 66 feet at $8.00 by another man, and he was the arbitrator to settle the number of yards not the price.

Court: That would be 22 cubic yards at $8.00

Mr. Jenns: Yes; I can get it out I can recapitulate.

To witness: It would be one of the lots on Columbia street—I don't know

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which—do you know the number? A. No, sir; it was the corner lot that was $5.50.

Q. And the other one that was $8. A. Yes.

Court: Were there 22 cubic yards on the corner lot? A. No, sir; 36.

Q. That would be how many cubic yards? A. Thirty-six cubic yards on the corner lot at $5.50.

Mr. Jenns: Does that include the coping? A. No, sir.

Q. What additional cost would that coping make? A. Well, the coping, I figured it up for the man that put it on, and the figures for the walls on Columbia street and Merrivale street was $125.00.

Court: On Armstrong street? A. Well, Armstrong street was 80 running feet of coping; I would judge that it was worth about $45.00.

Re-direct by Mr. Wilson.

Q. You told us that the stone wall in front of lot 8 cost $8.00 a foot—how is that?—$8.00 a cubic yard, I mean? A. Well, I think Mr. McNamara was not well posted on the way to go about getting a stone wall built at the time. In fact, he told me so himself, about it.

Q. And the increased cost arose from that, you think? A. Well, he said so.

Frank Forrest. Called and sworn.

Examined by Mr. Wilson.

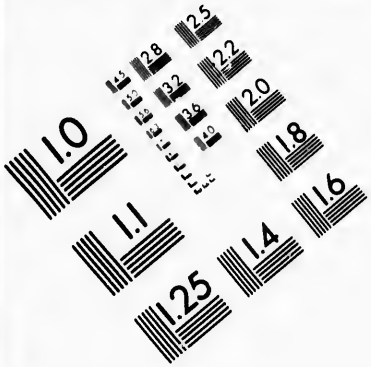
Q. You are superintendent of roads for the city? A. Yes, sir.

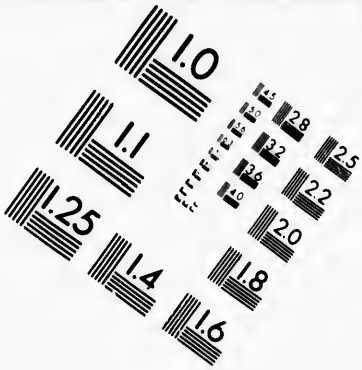
Q. How long have you been living here? A Since the spring of 1862.

Q. But how many years have you been down in New Westminster? A. I come down in 1871.

Q. And have been residing here, since then, haven't you? A. Yes.

Court: What time did you go on the roads here, first? A. Well, I don't know.





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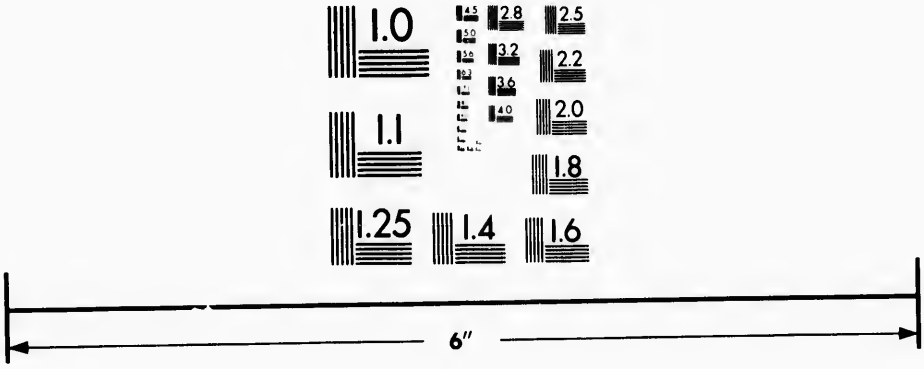

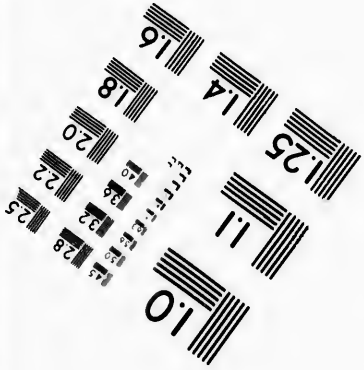

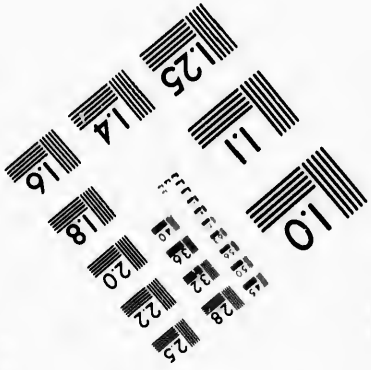

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Q. It was before 1876, was it not? A I don't quite know; it is a long time ago.

Mr. Wilson: You know Mr. McNamara's lots at the corner of Merrivale and Columbia streets? A. Yes.

Q. Do you know that stone underneath the sidewalk? A. Yes; I put that in there.

Q. By whose direction? A. Mr. Turner, I think.

Q. He was the surveyor? A. Yes.

Q. When did you put that in? A It is a long time since.

Court: You are speaking of the stone on the base line, in the official map of 1884? A. Yes, there are stones all over town, on every crossing.

Mr. Wilson: You say you put that stone in by Mr. Turner's direction. Will you tell us about the year you put it in, or about it? A. Well, there was one at Mr. McNamara's corner on Merrivale street,—not the corner—but so many links off the corner, and one down at Blackwood street, and one at Keary street, and one at Douglas road and Columbia street.

Q. When did you put them in, Mr. Forrest—what year? A I cannot tell that.

Court: Do you recollect when the new city map was made? Was it not during the making of that survey that those were put in? You recollect that map made in 1883? Mr Turner and Mr. Chas. Woods prepared the new official map of the city. A. Yes; but I don't mind the year.

Q. But how long was it before the new map was made that you put those stones in?

Mr. Wilson: Within one year, one or two years,—we are not particular to a year.

Court: Supposing, for the sake of argument, that the act passed in 1884, probably you put them in in 1883? A. Yes

Mr. Wilson: How many years after you came down from Cariboo? That is a good way to recollect sometimes. A. I imagine it is a longer time than that. I mind it is more than nine years.

Court: Was that the time when you put them in that you were making the base line for the purpose of getting an Act of Parliament about the city map? That is the survey in which Mr. Chas. Woods and Mr. Turner were engaged for the purpose of making a new city map, then, that the time those stones were put in?

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A. I don't mind; I can't say.

Court: Well, he says that they were put there in under Mr. Turner's directions, and that is a matter of historical fact. There is no difficulty in getting another witness to prove that Mr. Turner and Mr. Chas. Woods were the gentlemen who made that survey on which the official map of 1884 was based.

Mr. Wilson (to witness): Had you charge of the men who laid the sidewalk on Columbia street? A. Well, charge? I seen who did it.

Q. Do you know Mr. Edmonds' fence there? A. Yes.

Q. Do you know how long that fence has been there? A. Well, it has been there a long time. I could not say how many years

Q. Has there been any change made at the fence? A. No; the fence there is no difference in the height.

Q. No change in the grade at Mr. Edmonds' gate? A. No.

Q Has there been any change in the grade where the stone is at the corner of Merrivale street? A. No.

Q. You have got those two spots fixed? A. The box (?) on Blackwood street at this end is the same as before the street was made, and Edmonds' gate is the same as it was, and the upper corner is the same as it was. It is even grade now—it was higher in some parts—the sidewalk was on a line with the road and it was on a line with the ground and it was sagged up and down, and we made an even grade through.

Q. When you made that, had Mr. McNamara moved his fence back?—built his stone wall? A. He had moved his fence off the street, and his wall was built. I was often asked when on this corner to take away the dirt for him. We took away the dirt; we wanted all the dirt for filling up the cribbing.

Q. And took the dirt which he had thrown out, to assist in filling up the cribbing? A. Yes.

Q. You know Armstrong street, too, from Merrivale to Blackwood? A. Yes.

Q. What condition was that in before these improvements were effected?

A. Well, there was a kind of a roadway through, but very muddy at the back of Edmonds', and then it went up a sandy hill and there was a duckpond at this corner. At the bottom of the fence it was very nearly as high as you could touch with your hand. I have looked at that ditch many a time; it was full of muddy stuff.

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Q. Then you did not cut it down—it was filling in? A. Yes.

Q. And weren't there large stumps still left in the street there? A. Yes; and some sticking in the ditch at the side; the road was not cut. It was a narrow place at one side of the ditch, and the sand and slack all come down on the road before it was filled in.

Q. Who dug away the ground here to allow the wall to be built on Armstrong street? A. Charlie Wear, the foreman; and McNamara said he wanted to cut a piece for his wall, and I said "all right."

(Adjourned to Monday, January 23rd, 1893, at 2.30 p.m.)

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

F. EVANS,

Official Stenographer.

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In the Supreme Court of British Columbia.

(Before Mr. Justice Bole).

New Westminster,

January 23, 1893.

McNAMARA

vs.

THE CORPORATION OF THE CITY OF NEW WESTMINSTER.

Mr. Jenns and Mr. Eckstein for the Plaintiff; Mr. Charles Wilson for the Defendant Corporation.

F. Forrest. Recalled.

Cross-examined by Mr. Jenns.

Q. As I understood you, Mr. Forrest, you said that there had been no cut by Mr. McNamara's, on Columbia street, at any time, is that so? A. The grades?

Q. Yes. A. No; the grade is the same as it was before.

Q. As it was before when? A. When they took it up.

Q. But before that, had the grade been cut down? A. I don't know that.

Q. How long have you been in the city, here? A. Since 1862.

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Q Do you remember, by the Queen's Hotel, a flight of steps running up there?

A. Yes; the old Columbia was filled up, and I guess it is filled up where the old Columbia used to be; it is filled up before we get to the level of where the street is now. The old Columbia used to be there. There was a place that come up by the old Columbia House; the old street is all filled up considerable all along there.

Q. Do you remember Mr. Webster's house? A. Yes.

Q. Did not the street run almost level with his front door? A. Yes; Mr. Webster, the time he was in the Council, and he done considerable of that; away up above it was cut down, but we cut it down considerable since the, the city did.

Q. At the time it was considerably cut down when Mr. Webster was in the Council, was it not almost all cut down by the Queen's Hotel? A. There was a little cut from the sidewalk, but not from the centre of the road. You may see by the grade of the old ground yet, you know. There was a little cut where the sidewalk is, but it was filled up in the road; the bank, you know, went that way. It was filled up, you know.

Q. How high does Mr. Webster's front door stand above the roadway, now?

A. Well, I could hardly tell you; it stands a good bit, but we found the centre of the road there at Webster's. It was filled up two different times since I have been working for the city.

Q. And how often has it been cut down? A. Well, it was never cut down on the street. It was cut by the end of the bank.

Q. Was it not cut down four several times? A. Well, Ritchie Burns had contract, and he ploughed that centre of the road all along of Edmonds about 2 or 3 feet until you come to Merrivale street.

Q. At Edmond's place, wasn't the ground so high that he had steps at one time? A. Well, I don't mind; it is a long time since. I don't mind for that.

Q. To go back to Armstrong street—at the back. In 1889 was not that cut down? A. There was a roadway into it. Smith and Baylis made a roadway just there at one side, next to Webster's.

Q. How much of a cut was made on that street. A. There was not much of a cut; it was all filled, but we went back on the lots a little; it was 18 inches, I guess.

Q. We will begin on the other side of Merrivale, between Black's lot and Webster's lot—how much did you cut in there? A. That is Mrs. Black's lot?

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Q. Mrs. Black's lot, and Mrs Webster's lot?

Mr. Wilson: Which is Webster's? A. Well, we cut, I guess, a very little of the road on the roadway, but we cut a little in the sidewalk, lowered the sidewalk.

Mr. Jenns: How much would you cut off the roadway? A. I could not say; about 6 inches—I could not say.

Q. Do you remember the back door of Mr. Webster's? A. Yes.

Q. Do you remember that there was a step from the street into that? A. I don't mind. I don't think we ever went so far back as Webster's.

Q. Do you remember that after the cut instead of there being a step down to the back, the step up from the doorstep had to be altered there? A. I don't remember.

Q. Do you remember the bank at the back of McNamara's? A. Yes.

Q. How much did you cut there? A. Well, I guess we cut—that is, where the cut was—there was no cut at McNamara's side. The same boards that time that was at McNamara's side are there yet. We took off, I think, two or three boards on Curtis' side. The bank went up slightly, and we brought it down. It was full of —— and stuff, and we didn't pick any of it at all.

Q. You had to cut off some boards of Mr. Curtis' to make the bank level? A. Yes.

Q. How far down did you carry that cut? A. It didn't run quite down as far as Mr. Curtis'—well, it might, and we followed the remainder down.

Q. Didn't it run down only as far as Mr. Edmonds' old lot? A. Oh, it didn't run to Mr. McNamara's old corner. There was a big water pond there all the time, and people that was living there—the young ones, I don't know which. I used to go there and run it out several times, but they used to dam it up. There was a duck-pond, I think that is what they had it for.

Q. So you do not think the cut went down beyond Mr. Curtis' corner? A. I don't think; not much, anyhow.

Q. It might have gone a little further? A. Oh, well; it might. I could hardly tell you now, you know. But I know it was a big fill all at the lower end of his lot.

Q. How do you account then, Mr. Forrest, for the drop in the ground from the level of Mr. McNamara's house on Columbia street to the street? It is some 6 or 7 feet there, isn't it? A. I don't understand what you say.

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Court (to witness): Mr. Jenns wants to know—Mr. McNamara's house, we all know is 6 or 7 feet above the street? A. Yes.

Q. That used to be Mr. Morrison's house? A. Yes.

Q. How do you account for the fact that the house is so much higher than the street? A. Well, it was always higher. It was 3 or 4 steps when Judge Brew lived there. I think so—I cannot mind it—but there was a good few steps anyhow, but I put that cribbing for McNamara 16 years ago—for Morrison—and it is there, what I put up, to-day, and the stone wall is not as high as I had the cribbing. Morrison had the cribbing high, and he had black dirt hauled and filled up and made a flower bed, and the stone wall is not as high so the cribbing.

Mr. Jenns: But from the top of the cribbing to the house, was not that level then? A. I don't mind whether it was a level piece or steep to the door, or not.

Q. Not from the door, but from the top of the cribbing to where the house stood—wasn't it a level garden? A. Yes.

Q. How isn't it now? Is it terraced up? A. I don't know; I never noticed, but I know the stone wall ain't so high.

Court: Do you know how many cubic yards of wall are built on lots 7 and 8? A. I don't know.

Q. As you have some experience in that kind of wall building, what would that be worth a cubic yard? A. I don't know much about that cribbing work.

Q. Do you know the wall that is on lot 42—on the lot that runs up into Carnarvon street—and that wall that is on Armstrong street? A. Yes.

Q. Well, what do you think that is worth a cubic yard? A. I could not say. I never had much experience.

Chas. Blair. Called and sworn.

Examined by Mr. Wilson.

Q. Your name is Chas. Blair, is it? A. Yes, sir.

Q. And you were foreman of the men who did the work for the corporation

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on Columbia street in 1890? A. Yes.

Q. Acting under Mr. Forrest's superintendence? A. Yes.

Q. Do you remember doing the work in front of Mr. McNamara's lots 7 and 8 on Columbia street? A. Yes.

Q. Was the wall erected before or after you did the work? A. Well, on the lot that Mr. McNamara lived on was complete before I commenced the work.

Q. And the other one? A. The other one was not.

Q. Was it in course of erection? A. No. We excavated for that wall.

Q. By whose direction? A. Well, the foreman told me to do it, and Mr. McNamara wanted it done.

Q. Mr. McNamara wanted it done, and in consequence of that the foreman told you to do it? A. Yes.

Q. Do you remember the sidewalk before this work was done? A. Yes.

Q. Is there any appreciable difference in the grade of that sidewalk before and now? A. I don't think there is any only that it is even grade.

Q. You also did work on Armstrong street, did you? A. Yes, sir.

Q. Do you remember the condition of that street before the work was done? A. Yes, sir, I do.

Q. What was its condition A. It was very bad; it was hardly passable.

Q. Who dug out the lots? made the excavation for the erection of the wall there on Armstrong street? A. I did.

Q. By whose direction? A. Mr. McNamara wanted it done, and he didn't know whether he would put a stone wall in it or a wooden fence, he said, and he told us they were far enough back—that he thought we were far enough back. It was a wet, springy place, and it slipped down that night on the work we had done. We had to take that out.

Q. You did the digging there under the circumstances you have mentioned? A Yes.

Q. You did that at Mr. McNamara's request? A. Yes, sir.

Q. Below, in front of that place on Armstrong street, was it a fill or a cut? A. It was a fill.

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Q. Where was the cutting done on Armstrong street? A. In front of Mr. Curtis'.

Q. That is where the bank is? A. Yes.

Q. And that is also the back of Mr. McNamara's Columbia street lots—do you know that? A. Yes, sir.

Q. At the back of Mr. McNamara's back fence, did you take away any ground there? A. Took away a little. There was a log up in alongside the bank there to keep the earth from going in on the lot, and we took that away, and just cleaned it out.

Q. The dirt that you took away there was dirt that was artificially there? A. Yes.

Objected to by Mr. Eckstein as leading.

Mr. Wilson (to witness): What depth, do you think, of a fill there was on Armstrong street? A. Well, I could not say.

Q. Roughly, Mr. Blair? A. Well, it was over a wagon road *(?)* deep, anyway. In that one place particularly there was a deep, wet hole, and we had to fill it up considerable; there was a place there filled out all the way to the Catholic Church.

Cross-examined by Mr. Eckstein.

Q. In carrying out these improvements, you worked from profiles? A. Yes, sir.

Q. Did you examine those profiles? A. Decidedly.

Q. What became of those profiles? A. Oh, they were worn out, carrying them in my pocket every day.

Q. Did you have tracings, or the originals? A. Mr. Cotton gave them to me—the engineer.

Q. I presume those profiles would shew exactly the cuts and fills of the streets? A. Yes.

Q. You have said in answer to a leading question by my friend that the dirt that was taken away was artificially there, that is, speaking of dirt there in front of the Armstrong street lot. How do you know? A. I saw that there was a log put in there, and stuff was filled in to make a sort of a roadway where the bank was.

Q. But the bank is not the bank of Mr. McNamara's? A. Yes, it is, on

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Q. In my examination I had in view Mr. McNamara's lot on Armstrong street. I thought you were speaking of the dirt on Mr. McNamara's lot on Armstrong street being artificially there A. No, no; the eastern corner of the other lot.

Q. Did you take the dirt away at the request of Mr. McNamara? A. We had to take the dirt away; any dirt that we took out we had to take away.

Q. At whose request? A. Of course I had to take it away for the city. When we excavated any dirt from these places, we had to haul it away—off the street.

Q What cut did you make on Columbia street in front of Mr. McNamara's property? A. Didn't make any cut; filled it up considerable.

Q. On both sides? A. Yes, on both sides; because there was a deep cribbing there, partly.

Q. And when you struck the cribbing, between what may be termed the cribbing and the old street, you filled? A. In front of the new sidewalk we filled it up a little on the street after we had graded for the new sidewalk.

Q. Why did the earth from the Armstrong street lots slip down? A. It was wet and springy; wet, spongy.

Q. Did it slip during the construction of the works? A. No, not slipping; only a little of the face came down.

Q. What was the prime cause of it coming down? A. Because it was wet, I suppose.

Q. You were working on Armstrong street? A. Yes.

Q. And excavating there? A. Yes; we were excavating about where we had to dig it out.

Q. And the dirt slipped into your excavations? A. No; we were grading the sidewalk, and when Mr. McNamara asked us to take it out for a fence or wall—he was not decided at the time which he would build, whether a stone wall or a wooden fence, and he told us we were far enough back, not to take any more out, and then it slipped down a little.

Q. How deep did you dig? A. Only a little off the sidewalk, and filled up the street.

Court: Do you know the value of that stone wall on lot 4? A. No, sir; it

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is not in my line of business.

Mr. Wilson: Was the stone wall built when you were on Armstrong street? A. No, sir.

Q. What was done there first? A. The wall was not built when I was finished there; there was nothing done. I went back some time after, and I see it built; I don't know how long after.

D. S. Curtis Called and sworn.

Examined by Mr. Wilson.

Q. Your name is? A. D. S. Curtis.

Q. You are the mayor of the city of New Westminster? A. Well, I do not appear in that capacity.

Q. But that is your official character, now? A. Yes.

Q. You have lived here how many years? A. Eighteen years.

Q. Two years ago, did you occupy any official position? What position did you occupy? A. I was alderman for several years.

Q. Where do you reside? A. At the corner of Merrivale and Carnarvon streets.

Q. Your property extends from what street? A. From Carnarvon to Armstrong.

Q. Yours are numbered lots 5 and 6 A. Yes.

Q. Then on the west it would be your property adjoins Mr. McNamara's lot 7? A. No, Mr. Wilson; it is adjacent to lot 4 on Armstrong street.

Q. And right immediately at the back of Mr. McNamara's lots 7 and 8? A. Yes, sir.

Q. Armstrong street intervening between lots 7 and 8 and your lots 5 and 6? A. Yes.

Q. Will you tell his lordship the condition of Armstrong street before the improvements were effected? A. I remember it as described by Mr. Blair and

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Mr. Forrest.

Q. That is, hardly passable; full of stumps? A. Almost impassable; no sidewalk, no grade, and several stumps.

Court: And a duck pond? A. Yes, sir; I remember the duck pond, too.

Mr. Wilson: And that duck pond was in front of Mr. McNamara's lot? A. Just about there.

Q. These improvements were effected in 1890. Had Mr. McNamara ever spoken to you about effecting improvements there? A. Yes.

Q. On more than one occasion? A. Yes, sir.

Objected to by Mr. Eckstein as irrelevant.

Court: It might be a matter to take into consideration, as I have the functions of a jury, as to the question of damages with respect to the depreciation of the property, if the works in question were made at the request or suggestion of the gentleman who now asks damages.

Mr. Eckstein: It cannot be binding on one side, and not binding on the other.

Court: If Mr. McNamara went to Mr. Curtis, he being a person in authority and having some influence in the direction of obtaining certain changes or improvements in the streets, and requested and pressed him as one of the municipal representatives to have this change made, and it can be shewn as one of the results of this conversation that the change was made, it may be—I do not say it will—some ground to rely upon as mitigation of damages caused by a state of things as to which Mr. McNamara himself was the first moving party.

Mr. Eckstein: Will your lordship ask the witness whether he was alderman at that time? A. My lord, the last time that Mr. McNamara asked me to get that street opened was in 1890; it was late in the fall. I told him I could not get it open, because we had, then, no funds.

Q. You were then an alderman? A. I was then an alderman, but I said I would endeavor to get it done the first thing in 1891, although I was not in the Council, and it was the first piece of work that the Council did in 1891.

Q. In 1890, you being then an alderman, a person in authority, Mr. McNamara applied to you to have this work done? A. He asked me while I was an alderman.

Q. And you say that you promised him that, although it could not be done during your term of office; you would endeavor to use your influence with the next

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Council to have it done? A. Yes.

Mr. Wilson: It was on more than one occasion? he was repeated in his request? A. Yes, sir; and I consider the work done has improved the property a great deal, too.

Q. Can you approximately fix in your own mind the money value of that improvement? A. I could not; I could if I owned the lot.

Objected to by Mr. Jenns, on the ground that in the Brighouse case any improvement in natural money value by rise in price of the lot could not be taken into consideration in an action at law, although it might be at arbitration.

Mr. Wilson: I didn't ask for that.

Court (to Mr. Jenns): I think Mr. Wilson may ask this question, because really after all if you claim depreciation, surely they have the right to put in evidence whether there has been any depreciation, or not. I don't think they can give evidence and shew how much the value has increased, but I think I am right in saying that inasmuch as your pleadings allege depreciation they may on the issue give evidence it has not depreciated; and he may further say, if he likes—I stop him there so far as depreciation is concerned—I think it has increased in value.

Mr. Jenns: My objection goes a little further than that, because it would be tied down to whether the cut in front of the lot was the same as if it was level. It is on all-fours with the Brighouse case.

Court: I don't think this is exactly on all-fours with the Brighouse case.

Mr. Jenns: This particular lot is absolutely on all-fours.

Court: I think that Mr. Wilson may put this question:—Has the lot been depreciated in value, and, if so, to what extent, by the opening up of Armstrong street as it is now?

Mr. Wilson: The witness has already said that the lot has been increased in value, and the question to which objection was taken was: "Can you form any idea in your own mind of the value of any increase?"

Court: I think you may ask this, but he must not say how much, because you would be immediately raising something outside the record in the nature of a counter-claim.

Mr. Wilson: I submit I am entitled to show it in mitigation of damages, or in absolutely sweeping the other away.

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Court: No; because I will tell you why; because it is absolutely necessary, and is the principle, for instance, in cases of railroad arbitration, as you know the Government has actually to introduce this principle that with respect to any depreciation of the property they had a right to set off the increased value by reason of the works complained of; shewing that inasmuch as they had introduced that statutory provision that but for that statutory provison on an ordinary enquiry as to damages the evidence would be limited on the side of the defendant to shewing that the claim of the plaintiff was not well founded; that the property had not depreciated but had increased in value, but at that stage I hold that your evidence cannot go any further.

Mr. Wilson: If your lordship will pardon me, I submit that there is no analogy in the case of a railroad or one of this kind. Here we are in the performance of certain work which is lawful in itself, and the claim is that the result of that lawful work has resulted in damage to someone else. It is to be borne in mind that we are a public body carrying out necessary and useful works. In this case, if the public body left the street in the condition in which it has been described to you they would be subject to indictment, and to relieve themselves from the possibility of any criminal indictment for that, they effect an improvement. The claim then made is that in so improving you have done me injury, and my answer to it, or part of my answer to it that I was bound to do the work, that it was lawful for me to do the work, and if your property has been slightly injured, the work I have done will more than compensate you for any injury you have sustained.

Mr. Jenns: That was all threshed out in the Brighouse case.

Court: Well, that is the way I look at it. You have the benefit of my ruling. Has it depreciated in value?—No Has it increased in value?—Yes. Has it materially increased?—Yes. At that stage I am afraid you cannot go any further. But if there were a jury, I can point out another thing, it may be ground of observation that the other side are very anxious to confine the evidence in this direction to the strictest technical lines. I think, on consideration, you will find that I am strictly right. I know—if I may say so I would be inclined if there were a jury to deal very strongly when I came to talk to the jury about the fact, that there was a disinclination (of course they are inside their legal rights) but a disinclination to raise any discussion towards the addition in value of the property by reason of the work complained of.

Mr. Wilson: Very well; I will not press the question. You understand (to witness) that the improvement is a material one, Mr. Curtis? A. He has a double-ended lot, now, and he had only a lot with one end before. That is why I say it has improved.

Court: You think it is materially improved A. I do, most assuredly.

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Mr. Wilson: You built a stone wall around your own property, didn't you, Mr. Curtis? A. Yes, sir.

Q. Are you satisfied without an action against the city? A. I am.

Q. Quite content? A. Yes, sir.

Mr. Eckstein. That does not alter the case one bit.

Mr. Wilson: Will you tell us please, what that wall cost? A. The stone wall cost $100.00 a chain.

Court: How much would that be per cubic yard, Mr. Mayor? A. Well, $8.00 or $9.00, I think, $8.00.

Mr. Wilson: It was $100.00 a chain—what height? A. I never figured it out that way. I gave a contract to make the wall at $100.00 a chain; the wall was 5 feet high. I think it is 12 inches thick. Eight or nine dollars is the usual price for cement walls.

Q. Do you know anything about the position in front of Columbia street of lots 7 and 8? Do you remember the old sidewalk there? A. I do

Q. Extending from Blackwood to Merrivale? A. Yes.

Q. Do you know Mr. Edmonds' gate there? A. I do.

Q. Was there any cutting down there A. Well, I could not give any information on that, Mr. Wilson. All I remember is this, that the cribbing in front of lots 7 and 8 was higher than my head. I have passed there a hundred times; it must have been 7 feet high before we touched the street at all. And I am sure of this, that the south-easterly corner of that lot the wall is not as high as it was before. That is the corner of Merrivale and Columbia street. I know that the corner is not as high as it was.

Q. What improvements have been effected on Columbia street? A. The street was graded—made an even grade from Merrivale street to Blackwood street, and it was also widened in front of lots 7 and 8.

Q. And widened a good many feet? 30 odd feet? A. Yes; as much as half a chain, and probably more.

Q. You remember, you tell us, that old cedar cribbing? A. Yes, sir.

Q. What was its character? A. Well, it was cedar faced with boards, cedar logs.

Court: Faced with tongued and grooved boards, painted? A. Yes.

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Mr. Wilson: In what kind of preservation? A. Well, I remember it as having been sagged-out a little. I may be wrong, but, as to that, I cannot be sure.

Cross-examined by Mr. Jenns.

Mr. Jenns: As far as that sagging was concerned, was it any more than the boards outside, or did you examine the cribbing? A. I say, I am not very positive about that.

Court: I might take the liberty of reminding his worship that the sagging was on Merrivale street, not on Columbia street.

Mr. Jenns: (To witness) You say you think that the lot on Armstrong street has been improved? A. I am sure it has.

Q. Is it not necessary now to have steps up on that lot? A. Yes, sir.

Q. Does not that make the lot more difficult of access? A. No, sir.

Q. It is less difficult to walk up steps than to walk in from the level? A. Less difficulty to get into that lot than it was before: I will explain why: because the grade of the lot originally ran into the street and the grade was straightened in a sort of fashion originally into the street, and when they went to put a sidewalk there the street was given an even grade, and was straightened out, and that made the entrance to the property probably, inside, a little more of a slope.

Q. In what condition was that street before? A. Well, there was a water pond on it. It is springy,—the nature of the soil is springy. There is a spring running out from my property now that used to keep the street in an impassable condition, and there were stumps there—one or two large stumps.

Q. What do you mean by "an impassable condition"? A. Used to keep the street wet, and there was no defined gutter, because the street was not made.

Q. Do you mean to say that the gutter was so impassable it was not used? A. It was used on the other side, more.

Q. Wasn't it continuously used? A. It was.

Q. For instance, did not all the funerals from the Roman Catholic church below go through that street as it was before? A. Yes, possibly they could get around there.

Q. Were not horses and buggies kept continually on the street? A. Certainly.

Q. Do you know whether it was used as a footpath at all? A. I think it was.

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Q. So that it was hardly impassable? A. Hardly impassable? I know that Mr. Edmonds had a box out there to keep his manure in, on the street.

Q. You told us that the cribbing on Columbia street was higher than your head? A. Yes, sir.

Q. That cribbing, I believe, ran up to the level of the ground inside? A. I think it did.

Q. And now have you noticed as to whether the ground is not levelled off? A. It is.

Q. About what height would the ground be? —putting the wall aside A. Well, my judgment would be that if the ground was level as it was before, the wall probably would be about the same height as it was before.

Q. Do you know whether any offers were made —you were in the Council that year? A. I was —'91.

Q. Do you remember going with Mr. Keary and Mr. Walker to Mr. McNamara? A. I do.

Q. Did you offer him then to go to arbitration? A. No, sir.

Q. What offer did you make? A. I didn't make him any offer.

Q. What did you go for? A. We asked Mr. McNamara if he would consent to arbitration, if we decided to go.

Q. Was he willing to consent? A. He was.

Q. Do you know whether he has made the city any offers since in reference to arbitration or any other settlement A. I think he has.

Court: What was that offer? A. I don't remember. I think I have a recollection of a certain communication.

Mr. Jenns: I do not think so, with my admission.

Mr. Wilson: By recalling Mr. Hoy we can prove that. I would have done it before if it had been asked me.

Wm. Noot. Recalled by Mr. Wilson.

Mr. Wilson. This is the map, my lord, which the statute makes evidence. I

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now put it in as formal proof, and I am going to ask you—my friends can have access to it at any moment—to allow me to take it off file at any time. If it were not that the statute made it formal proof, I should not be obliged to put it in. Exhibits "A" and "B" are exact enlarged copies of this.

Mr. Jenns. I admit that the documents already in are exact copies.

Mr. Wilson: There is another document that I want to put in.

To witness: What is that? A. That is the list of stones marked on this official map; the record of the base line marked and of the dates they commenced in Oct. '79 and completed their work on the 31 March.

Court. Is it necessary to mark this as an exhibit?

Mr. Jenns: I do not think so, with my admission. I would have done it before if it had been asked me.

Court: The official map and the base line notes?

Witness: Yes; or commonly called field notes.

Mr. Wilson (to witness): Have you checked the line of the street, Mr. Noot? A. I have, sir, from Blackwood to Merrivale; we have been using those stones as the grade.

Court: What do you find with respect to the wall, now? A. I find that lot 7, at the corner of Merrivale and Columbia streets, the line of wall is about half an inch on the street at the point there, and, between lots 8 and 9, adjoining Mr. Harvey's lot, the wall is out in the street 1¾ inches.

Cross-examined by Mr. Eckstein.

Q. Have you made any search for the profiles? A. I have, sir.

Q. Have you found them? A. There are no profiles existing to-day in the office, sir I have never seen one, and I think probably the foreman has been just calling profiles what you would call profiles to-day..the cuts and fill notes that were given him by the city engineer.

Q. I saw in the Brighouse case there was a long paper rolled round several times, and it shewed exactly the winding of the streets and the different grades and cuts? A. Yes; I understand exactly what a profile is.

Q. If those were all in the city's possession, it would save Court and Counsel a great deal of time and a lot of trouble if they were produced here to-day? A. I believe, sir, they were prepared for contracts, but where the city men carried out the day work I don't think they prepared profiles. I think they simply went by

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the direction of the engineer; there are no profiles in the possession of the Council to-day.

Q. None even of Agnes street? A. I have not looked, sir.

Q. I thought you said there were none whatever? A. Of the street mentioned

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H. Hoy. Recalled by Mr. Wilson.

Mr. Wilson: We have it in evidence, my lord, that Mr. Hoy was alderman at the time these improvements were effected.

Court: Were you, then? A. Yes, sir 1890?

Mr. Jenns: I would like to ask my learned friend what he is recalling Mr. Hoy for?

Court: Yes; Mr. Jenns has a right to know what you propose to recall him for?

Mr. Wilson: Partly on the point you desired to be cleared up with respect to the arbitration, and I want to put another question or two as to these improvements which have been effected: that is, both on Armstrong street and Columbia street.

Court: Well, I do not know that. It is going back on the case again. I tell you what I think. You might leave Mr. Hoy till you come to the end of your case, I want to recall him myself and ask him some questions. Let Mr. Hoy stand down.

Mr. Wilson: One of my witnesses nearly broke his neck on Armstrong street owing to the condition it was in. I want to call him; not that he has an action against the city, and he is really a very reluctant witness.

Court: Can you compel Mr. Woods, as he is a reluctant witness, to give evidence.

Mr. Wilson, I believe, my lord, that I have a right to do so, but, however, I shall not.

Court: I really do not like to call anyone who is not subpoenaed in the regular way.

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Mr. Wilson: But it seems to me that a gentleman who has run a serious risk in going over that thoroughfare should be permitted to give his evidence.

Court: Mr. Woods has probably exercised more Christian forbearance than many would in not suing the city.

Mr. Wilson: And I want him to carry that Christian forbearance a step further and give evidence upon it.

Mr. Eckstein. Mr. Woods should not travel along the back streets.

Hy. Smith. Called and sworn.

Examined by Mr. Wilson.

Court: What is your Christian name? A. Henry Smith.

Mr. Wilson: You are a stonemason, I think? A. Yes, sir.

Q. And you built a stone wall for Mr. McNamara in front of lot 8? A. Well, in front of the house where he resides. I don't know the number.

Q. Who gave you the lines for building that wall? A. Well, I really took the lines myself from Mr. McNamara. There was a little tack on the fence in front of Merrivale street, and I took the line from there—that tack and the Queen's Hotel.

Q. You took the line yourself? A. I took the line myself. Mr. McNamara shewed me where the tack was.

Court: How much is that work worth per cubic yard? A. Well, I should think, that wall is split rock, and would be worth about $8.00 a yard, that split rock; the other walls are different.

Q. How many yards in that job altogether? A. I never measured it by the yard. I think it was about 22 yards.

Q. And on the side? A. It was only just in front of Mr. McNamara's own lot where he resides; that is, 1 chain.

Q. Twenty-two cubic yards in front of lot 7, I suppose the same number? A. I don't know, your lordship. I didn't do it by the yard; I did the excavating; did it by the lump sum, sir.

Mr. Wilson: That is my case, my lord; subject, if your lordship wishes, to re-

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call Mr. Hoy.

Court: Yes, and you see, Mr. Wilson, that is the most convenient way to dispose of it, because I recall him per curiam.

Mr Jenns: I have two witnesses, or one at all events whom I want to call in rebuttal. We are all familiar with the circumstances, and know that the cut was made some time ago on Columbia street, which would extend from Capt. Pittendrigh's old house—I don't know who is living in it now—down nearly to the Queen's. But Mr. Noot, in giving his evidence yesterday, was of opinion that no cut ever was made.

Court: I think I would like to hear Mr. Hoy first.

H. Hoy Recalled by Court.

Q. With respect to the first matter, do you recollect that Mr. McNamara made any offers or entered into any negotiations with you as alderman of the Council with respect to alleged damages to this land. A. No.

Q. Did the Council make any proposal to him about settling by arbitration? A. Not to my knowledge.

Court: The other matter you wanted to ask, Mr. Wilson? Just remind me, and I will be glad to ask it.

Mr. Wilson: That is as to whether they did not want consequential damages?

Court: For lots 7 and 8?

Mr. Wilson: Yes.

Court: Their own pleadings shew that, and then they abandoned it.

Mr. Wilson: About the improvements there, Mr. Hoy? Do you consider those lots are greatly improved?

Objected to by Mr. Eckstein, that question should be asked, if at all, by the Court.

Court (to witness): Were they materially improved or depreciated by reason of the work done? A. I should say materially improved, especially on Merrivale street and Armstrong street. If you will allow me to correct about arbitration. I might state that last year there was some correspondence with Mr McNamara's

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counsel asking it to arbitrate, and there was some correspondence with myself and others: we went down there and met Mr. Eckstein and Mr. Jenns in Mr. Eckstein's office, and we wanted to know what could be done; they told us that the Counsel had no power to arbitrate, and the basis of arbitration would be that that Counsel would give a stone wall; that is all I know.

Q. The cost of a stone wall? A. The cost of a stone wall.

Mr. Jenns: That was after the action had commenced? A. It may be: I could not say to that.

Mr. Jenns: There is a question arising out of that that I would like your lordship to put: Supposing the plaintiff had been a poor man and unable to put up the retaining wall opposite these lots, would the witness then consider them improved by the cutting down?

Mr. Wilson: That is horrible: because he was a trespasser on the street, anyway, and he had to take it down.

Court (to witness): Supposing the stone wall had not been put up, would the property have been improved or deteriorated? A. Yes, my lord.

Q. Improved notwithstanding the want of the stone wall? A. It would have been improved notwithstanding the want of the stone wall.

Mr. Jenns: I wish to call Mr. Moresby as to the grade of Columbia street in the old days.

Mr. Wilson: When?

Mr. Jenns: About 16 years ago.

Mr. Wilson: That I object to, my lord. I would like to have some of Mr. Moresby's reminiscences, but unfortunately we are bound by our pleadings.

Court: The rule as I understand it with respect to rebuttal evidence which takes the other party reasonably by surprise may be rebutted.

Mr. Wilson: Yes, my lord; but can this have any possible effect? because on the pleadings the allegation in all three cases is that the injury is the result of work done in 1890, and what was done before then is immaterial, and even if it were evidence could not be given of it because there is no allegation in the statement of claim that it was the result of work done before 1890 or 1891.

Court: No; but I will tell you what it might be. There is an allegation on the pleadings that these fences or whatever they were, were constructed according to certain grades as established by the then acting corporation of the City of New West-

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minster, and it may be—I don't say it is—that if these grades were given at a former period, it may be a matter to shew that on a former occasion a legally constituted officer of the Council fixed the grades and that those fences were built in accordance with the grades. Because I take it to be the law that a corporation could not go and arbitrarily alter a grade year after year. They must be bound by something, and it may be in the direction of estoppel, but confining you strictly to the fact—Was there a previous alteration? I am with you, and have given you the reason why.

W. Moresby. Called and sworn.

Examined by Mr. Jenns.

Mr. Wilson: I want to make a further objection if your lordship pleases, that even if that be the evidence, then it is part of the plaintiff's case, and, according to the agreement or understanding with the plaintiff, the case was closed, the only witness to be called being Mr. Robson, for the purpose of producing documents which he had not had time to search for. This is not evidence rebutting our statement, but evidence which would be in support of his own statement of claim; and he cannot now, I submit, bring in evidence to bolster up his case which he has failed to make in the first instance.

Court. The further ground that I allow it upon is this: Surprise is always a ground to bring in evidence in rebuttal. For my own part, I am taken immensely by surprise, because I happen to know it is not in accordance with the fact; and it has taken me very much by surprise—the testimony that has taken place. Mr. Jenns, no doubt, has a right to be surprised. No doubt these gentlemen gave evidence according to the best of their ability and observation, but I do not apprehend any difficulty would arise in calling 100 witnesses to prove that there was an alteration.

Court (to witness): Mr. Moresby, you know Columbia street in front of lots 7 and 8, what we used to call the "old Morrison lot?" A. Judge Brew's property?

Q. Yes; and the Michaud lot next to it. A. Yes.

Q. Was the grade of the sidewalk in front, or of the street, was that altered before 1890? A. You mean the present grade?—or do you mean, is there any dirt been taken away?

Q. Yes; any change. A There has been dirt taken away, I think. I never measured it, but I remember when I used to walk out to the camp every day

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we walked nearly on a level with Judge Brew's property. There was really no cut worth speaking of, as far as I remember.

Q. As far as Mr. Webster's? A. There was a slight slope, but there was a good deal cut there.

Q. Have you any doubt in your mind that there was cutting down before before 1890? A. I am almost certain, but I could not say how much; I never measured.

Q. But there was a change in the grade of the soil in front of that lot? A. No doubt about that.

Q. And in the direction of being lowered? A. Lowered.

Cross-examined by Mr. Wilson.

Q. How long ago is it that the ground was on a level with Judge Brew's property? A. Well; I am talking of early days; perhaps '63, '64, and '65.

Q. So what you have referred to was in 1864 and 1865? A. In '64 or '65; it might have been later, but in the 60's.

Court: No changes since then? A. Oh, there has been changes, but I am talking about where we used to walk.

Q. But in front of Mr. Webster's? A. I believe there has been, but I have not paid particular attention. Some was cut down, and some of that fell in again. I remember the Catholic Church was cut down; there was only a very little embankment there, and now there is quite an embankment, and when I used first to go in the Catholic Church there were only a very few steps, but now there is an immense lot of steps there.

C. Woods. Called and sworn.

Examined by Mr. Jenns.

Court: Will you kindly tell us whether any change has been made in the grade since 1890? A. Yes; my evidence will be almost exactly the same as Mr. Moresby's, except that I could bring it down to a more recent period.

Q. And what is the most recent period when the grade was lowered? A. I cannot state the date the grade was lowered, but I distinctly remember in 1872 that the grade there was as Mr. Moresby described it—almost on a level with the

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buildings; in this particular block the only buildings that then existed were the Roman Catholic church—a house that is now known as the Edmonds house—two houses, and the property known as Judge Brew's, and they were all, I should say, a couple of steps from the sidewalk would put you on a level with the buildings, with the exception of the Roman Catholic Church which was rather higher. My recollection was that the grading was done gradually, lowered from time to time.

Q. I suppose the Corporation funds were small in those days? A Were small; I won't say a little done every year, but done from time to time until it reached its present grade; but I am positive there has been very little alteration in the present grade—I don't know whether I am going too far—very little alteration in the present grade since 1879.

Q. Till 1890? A. Between 1872 and 1879 I think most of that grading was done.

Mr. Wilson: With all respect, my lord, I fail to see the importance of this evidence, because the whole of the grading was done between 1872 and 1879. I would have admitted that, because we are charged with damages in 1890?

To witness: In 1890, there was very little change made? A. Are you talking of Columbia street?

Q. Yes. A. Practically no change in 1890.

Q. By the way, the street has been greatly improved there, has it not? The corporation did good work? A. Yes, I consider so.

Q. And you think the property has been improved too, don't you? A. Yes; I should judge the property has been improved.

Q. And on Armstrong street the same? A. Yes; I must admit it has.

Q. Very materially improved? A. Yes, I am of the opinion—I am talking now rather of the lots in question—I am not quite familiar with the position of Mr. McNamara's lot as it stands, but on the upper side of Armstrong street, I am not familiar with the grade, I mean.

Q. You admit that along here there is a very material improvement? A. Yes, at the back of lots 7 and 8.

Q. And also here? A. Yes, also there.

D. Ronson. Recalled.

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Examined by Mr. Eckstein.

Q. Do you produce a letter written by Mr. McNamara or his agent asking for compensation with reference to the cutting down of Columbia street? A. No; I was asked to produce an agreement.

Q. Well, I have fortunately a transcript of the evidence given the other day, and that is one of the matters asked for. "Do you produce any letters from Mr. McNamara or his agent relative to compensation for excavation?"

Court (to witness). Have you got those in your custody? A. Your lordship, when I left the witness stand the other day it was to produce, I believed, an agreement. I was questioned as to the agreement between the corporation and Mr. McNamara under seal, and I was not aware that these other records would be wanted to be handed up at the same time.

Mr. Eckstein: If your lordship please, Mr. Robson came here and made a statement, quite correctly, that in view of the short time that had elapsed since notice was given, he was unable to produce the documents asked for.

Court: But Mr. Robson very fairly explains that he misunderstood what it was that was wanted. Of course if Mr. Robson has these documents I have not the smallest doubt that he will be only too glad to produce them, and for the purpose of having them produced we will have to let them stand over.

Mr. Wilson: Is there such a document, or are my learned friends hunting for a document which they hope they will not find?

Witness: I believe, your lordship, there was, but the agreement to which Mr. Eckstein refers, I have no knowledge of that.

Court: The witness says he believes there is some letter?

Witness: Asking for compensation.

Mr. Wilson: All letters from the city solicitors, more especially the one advising the Council that they have no defence to the action, but could assess the damages in Court as cheaply as by arbitration, and also all letters written by or on behalf of the plaintiff in the matter. The only things here are letters from the city solicitors Have you got those, Mr. Robson? A. I have the letter referred to in that.

Q. Have you got the letters written by or on behalf of the plaintiff—any letters written on his behalf?

Mr. Jenns: Just the letters we are asking for, now. A. I have one letter from the solicitors for the plaintiff, but I have not the letter referred to.

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Mr. Wilson: Is there such a letter that you know of? A. I think there is.

Court: We will take Mr. Robson's statement to-morrow.

Mr. Wilson: But this is not a proper subpœna which could not indicate to the person upon whom it is served what is wanted.

Court: On Thursday it came out what it was they wanted, and I think Mr. Robson misunderstood; he thought they were referring to an agreement which really has no existence. Witness: If your lordship please, Mr. Eckstein asked me repeatedly if there was such an agreement, and it was there that the evidence was stopped.

Mr. Eckstein: I have the witness' statement here. (Reads transcript referring to the matter.)

Witness: But that is not where the examination stopped.

Mr. Eckstein: I know, and I went on enumerating other documents. Witness: Yes.

Mr. Wilson: The mischief is this: the Rules of Court provide for the production of the whole of the documentary evidence long before trial; and they have failed to ask to have them produced before, and only subpœna Mr. Robson a few minutes before trial to produce them and be examined.

Court: Let us understand exactly. Will you kindly specify what documents you want?

Mr. Jenns: They are on the subpœna; we want any by-laws or resolutions of the Council at any time in reference to the cutting down of Columbia street at any time; that is, the change in the line of the street.

Mr. Wilson: Before my learned friend goes any further; that is too vague altogether—any by-laws or resolutions of the Council at any time

Mr. Eckstein: That subpœna, my lord, is as ample I expect as any served by my learned friend. Witness: As I understand it, I would require to go over the books of the corporation and the minutes and the by-laws and the reports and the correspondence for a great many years, and to take copies of those resolutions and by-laws and so on, it would require several days. If I knew exactly what was wanted, I would produce it, but I have produced whatever was specifically asked for.

Court: I think you might give Mr. Robson some indication of what is wanted.

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I cannot disguise from myself the fact that to follow everything that is asked for here would involve an exhaustive search in the archives of the corporation.

Mr. Jenns: Mr. Robson is the only person in whose knowledge the matter lies. The only thing I know is bylaw 4, which was passed, May '61, but that did not extend beyond the Wintemute factory.

Court: I think the best thing is not to persist on the strict legal rights on either side; I am sure that Mr. Robson would be only too glad to give the information, and it appears to me a way to get out of the difficulty would be for Mr. Eckstein or Mr. Jenns to attend and see Mr. Robson in the morning.

Mr. Jenns: I should be only too happy, but as far as my legal rights are concerned, I am entitled to have every document and record of the Council produced here in Court.

Court (to witness): You are quite willing as to that? A. I would be quite willing to produce all the books. I would rather do that than hunt them up.

Court: Will you kindly do that, Mr. Jenns, and let Mr. Robson's statement stand till to-morrow. Mr. Robson will be wanted here to-morrow, and perhaps had better see Mr. Eckstein or Mr. Jenns and meet and discuss this question.

Adjourned until January 23rd at 11 a.m.

THIRD DAY.

January 23, '93.

Upon the Court assembling,

Mr. Wilson: There is one difficulty about this thing, and that is the mischie

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of the plaintiff splitting up his case in this horrible way. It is proposed now, my lord, to put in a bylaw, and my objection is that unexplained that bylaw might create a very inaccurate and misleading impression. I am satisfied for the bylaw to go in, but I want to explain it.

Court: I think if Mr. Robson comes up to produce it, you may ask him questions upon it.

Mr. Wilson: It is just like this. There is no jury, the bylaw is dated 1873 establishing grades, and I am instructed rightly or wrongly that the grades in 1873 —that these stones—have not been substantially changed, but were the same in 1873 as now

Court: Of course, as you say, there is no jury. You rely upon the Grade By-law, 1873, I will call it. Anyhow, it will not mislead me, the bylaw which regulates the grades, and that those grades have substantially never been changed since?

Mr. Wilson. Yes: that is what I say, my lord.

Court: You see, Mr. Wilson, as I said yesterday, I knew that they had been changed since 1862, and I was right, in 1873, and these works were carried out in 1874, '75, and '76, and I arrived here in the early part of 1877, when some of those works were going on. Curiously enough, that by-law bears out the accuracy of my recollection. The cutting down of streets in a town is almost unknown except in railway construction, and it struck me as a very wonderful habit, first making and then unmaking it. Will you put in that by-law, Mr. Robson?

Mr. Wilson: Then it is understood without calling Mr. Noot to prove that, that is accepted?

Court: It is put in as evidence.

Mr. Wilson: And it is accepted what I say? That is to say, that there has been no substantial change?

Mr. Eckstein: We are not going to make any bargains.

Court: Of course if they consent to do that, that will be sufficient.

Mr. Jenns: We simply put in the by-law for what it is worth.

Mr. Wilson: Then I object to the by-law going in.

Mr. Eckstein: Of course my friend has a perfect right to make any objection, or to say that we have split up our case in any way, but with all due deference to him I submit that we have not done so; we have split it to a certain extent, owing to Mr Robson being unprepared.

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Court: Owing to the fact that the notice given was not sufficiently long; Mr. Robson had difficulty in producing the documents, and I at once suggested that Mr. Robson who as we all know is a most efficient officer and only too glad to supply the Court with anything materially bearing on the case, should produce them later on. The time elapsed and Mr. Robson it appeared misunderstood some matter required of him, and a further adjournment was had to enable him to have further time, at my suggestion to see what you wanted, and now he appears and produces a certain by-law. What is that by-law called?

Witness: The Columbia street grade by-law, 1873.

Court (to Mr. Wilson): You object to its production?

Mr. Wilson: Unless I am permitted to produce Mr. Noot to explain what I have stated, my lord.

Court: I propose to call Mr. Noot, and ask him that question, or any question I think proper.

Mr. Jenns: The only objection I have to that is this, my lord: If Mr. Noot, who is a witness for the defendant is recalled, I really ought to have the right to call a surveyor, myself. I know the grade of Columbia street in some places has been altered 5 or 6 feet, and if in one case, why not in another? Mr. Noot might say exactly what I know to be correct. Again, Mr. Noot might say not in this spot, but in another spot.

Mr. Eckstein: Another thing, Mr. Noot's theory is very well indeed, but we have two witnesses here to shew that at one time Columbia street ran almost on a level with these lots, so I think we should have a surveyor ourselves.

Mr. Wilson: Mr. Noot is your own witness. You called him, yourself.

Mr. Eckstein: We are not calling him, now.

Mr. Jenns. All this quarelling is a little previous, because the by-law is not put in, yet.

Court: Mr. Wilson, the trouble arises from what I may call an inevitable action. I cannot say but I think the case has been very well handled on both sides I should certainly like to ask Mr. Noot, but I should certainly think that if Mr. Noot is of opinion it is not changed, I should very much like if it can possibly be done, to call another surveyor who has been acquainted with the ground all the time. The only thing is this, Mr. Woods is a surveyor and he was not distinctly clear on the subject.

Mr. Eckstein: I would suggest to your lordship that Capt. Jemmett who surveyed this city under instructions of this city, and who drew the map which for a

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long time was the only one in existence for the city, might throw a good deal of light on the question.

Court: Of course, I intend to go on with the next case, but Mr. Wilson will, you allow me to suggest that Capt. Jemmett be called before argument, because he is a perfect engineer and has also a knowledge of the locus in quo?

Mr. Wilson: Again it comes back to the old difficulty, if Capt. Jemmett is called, I should like to ask him some questions, myself.

Court: Well, if I call him, I shall permit both sides to examine him as much as they like, but at this stage I will allow no more witnesses to be called.

Mr Wilson: An affidavit of documents would have got over all this trouble.

Mr. Jenns: As I say, all this is premature. I do not intend to put it in.

Court: Then we have wasted half-an-hour

Mr. Jenns: I have never said I was going to put it in: only a bundle of letters. It was my friend who said I was going to put it in.

Court: Now, what are you going to put in?

Mr. Wilson: Now, I want to see the letters. The documents that my learned proposes to put in, my lord, are unobjectionable with one exception;—that is a letter written by ourselves to the corporation, and that I say is a privileged document.

Court: Let me look at it.

Mr. Wilson: Well, if your lordship looks at it it might as well go in. It is a letter written by the city solicitors to the corporation.

Mr. Jenns: A copy of which appeared in the public newspapers at the time.

Mr. Wilson: You could not put in a public newspaper. I don't know that it makes much difference, but there is no question about its being a privileged document. In that case, if one of our letters are to go in, I submit they all ought to go in. It is very unfair to pick out half-a-dozen documents, and to pick out one of my letters and say I won't put in the other ones, as my case is closed, and I cannot put them in.

Mr. Jenns: The other letter which my learned friend objects to is one enclosing mine, written without prejudice. I have no objection to his going in, but the

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letter written without prejudice cannot be used.

Court: But really this is a privileged communication. I am not controlling you, nor do I seek to control you in handling your case, but it naturally cannot help striking my mind that only so much of the correspondence that has gone in represents one side, and one side I must say would not weigh very strongly on my mind without anything else. In the capacity of a jury I assume it is not unlikely I would not attach so much weight to letters which only have reference to one side, the obverse being kept away from me. I cannot tell what this was in reply to. If much weight is to be attached to this correspondence, speaking from a jury's standpoint, it occurs to me that the weight would only be the result of the whole correspondence, and not a partial inspection. Of course, it is for the plaintiffs to put in what evidence they wish, but it seems to me that the principal object of evidence is to have the greatest possible weight, and I think it only right to point this out.

Mr. Jenns: The only letter I object to is the one written without prejudice. I have no objection to your lordship seeing it, but it cannot be part of the record of the case.

Court: You have no objection to my reading it, Mr. Wilson, have you?

Mr. Wilson: Not at all, my lord. In point of fact, my idea is if any of the correspondence goes in, put it all in.

Court: I cannot say, Mr. Wilson, that Mr. Jenns is doing wrong in declining to allow that letter to go in, because it is within the rule, and, on reading it, although you have had the advantage of my knowing the working of the minds of the other side, still it is not evidence.

Mr. Wilson: There is nothing in it, anyway. That is, it would have no effect. Of course, all those suggestions contained in that letter amount to nothing when you come to litigation, any more than the suggestion contained in my letter amounts to anything. These things are proposals for settlement, but settlement not being arrived at, the parties are relegated to their legal rights. That does not change my position at all.

Court (to Mr. Jenns): What letter do you put in?

Mr. Jenns: I simply ask Mr. Robson if those are the letters that have been received in the matter?

Court: Are those the letters, Mr. Robson? A. Yes, my lord.

(Eight letters, marked exhibit "C.")

Mr. Jenns *(to witness)*: I expect there is no bylaw in reference to Armstrong

street

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street? A. Not that I am aware of. I don't find any.

Q. Except the one you told me of, that general bylaw of 1888? A. Yes.

Q. Which was mentioned in the Brighouse case? A I don't think that referred to Armstrong street, or referred to any street at all.

Case closed on both sides. Adjourned for argument to a day to be fixed.

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

F. EVANS,

Official Stenographer.

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In the Supreme Court of British Columbia.

BETWEEN

JAMES McNAMARA,

PLAINTIFF,

AND

THE CORPORATION OF THE CITY OF NEW WESTMINSTER,

DEFENDANTS.

The action herein was brought to recover damages for injury alleged to have been sustained by the plaintiff in consequence of the streets, on which several lots, his property, are situate, being excavated, in order to lower the grade, to such a depth that the soil of his lot caved in and fell into the excavation, and for other injuries to plaintiffs lands by reason of such excavations. At the trial it was not seriously contended that any appreciable injury was done to the property on Columbia Street other than what was caused by the subsidence of the plaintiff's lands from want of proper support, rendered necessary by the excavation complained of.

After hearing the evidence, which was voluminous, occupying two days, and the argument of the learned counsel on both sides, which were well calculated to assist the Court in coming to a conclusion in the premises, I feel I can, in coming to a conclusion, with propriety adopt the words of Mr. Justice Gwynne, in New Westminster vs. Brighouse, 20 S.C.C., p. 576, as conveying exactly the views which I hold:—

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"The plaintiff is, in my opinion, entitled to maintain this action upon the principle that the non-prevention of the subsidence of the plaintiff's lands into the excavation made by the Corporation in the Streets, however legal the making of the excavation may have been, if skilfully excavated, instituted such neglect in the manner in which such works were executed as to entitle the plaintiff to recover in this action."

It is clear upon the evidence that the injury to the plaintiff's lands complained of and proved could have been prevented and any litigation rendered unnecessary by the erection of a retaining wall. It was therefore encumbent upon the Corporation to have erected such walls as are a necessary precaution to prevent the sinking of the plaintiff's lands into the excavation, made by the Corporation for their own purposes in the streets. And I cannot help expressing regret that the Corporation did not cause retaining walls to be erected instead of compelling the plaintiff to so himself, and then come to this Court to realise the costs of doing that which ought to have been done in the first instance by the defendants. I am of opinion that the plaintiff has sustained damage by reason of the defendants' wrongful conduct, which they should pay to the extent of $425, and I therefore give judgment for the plaintiff in such sum of $425, with all the costs of and incidental to this action.

W. NORMAN BOLE, L. J. S. C.

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In the Supreme Court of British Columbia.

ON APPEAL TO FULL COURT.

BETWEEN

JAMES McNAMARA,

PLAINTIFF,

AND

THE CORPORATION OF THE CITY OF NEW WESTMINSTER,

DEFENDANTS.

NOTICE OF APPEAL AND GROUNDS.

TAKE NOTICE that the above named defendants appeal from the judgment pronounced in this action by His Honor Judge Bole on the 28th day of March, A.D, 1893.

And further take notice that the Full Court will be moved on Monday, the 10th day of July, A.D. 1893, or so soon thereafter as Counsel can be heard by Mr. Charles Wilson of Counsel for the abovenamed defendants on their behalf, that the said judgment may be revised and judgment entered for the defendants.

JAMES W. McCOLL.

Solicitor for Defendants.

To

E. A. JENNS, Esq.

Solicitor for above named plaintiff.

Dated the 3rd day of May, 1893.

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In the Supreme Court of British Columbia.

BETWEEN

JAMES McNAMARA,

PLAINTIFF,

AND

THE CORPORATION OF THE CITY OF NEW WESTMINSTER,

DEFENDANTS.

GROUNDS OF APPEAL.

TAKE NOTICE that the following are the grounds of Appeal to the Full Court from the Judgment of His Honor Judge Bole herein.

1. That the material allegations in the Statement of Claim are not proved.

2. That the material allegations in the Statement of Defence are proved.

3. That the learned Judge erred in finding for the Plaintiff.

4. That the damages are excessive.

5. That the Plaintiff is not entitled to maintain the action.

6. That there was no negligence on the part of the Defendant Corporation.

7. That there is no duty on the part of the Defendant Corporation to erect a retaining wall.

8. That the work complained of was done by the Plaintiff's leave.

Yours, etc.,

June 24, 1893.

JAMES W. McCOLL.

Solicitor for Defendants.

To

E. A. JENNS, ESQ.

Solicitor for above named plaintiff.

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